Cogburn Healthcare Center, Inc. *and* United Food and Commercial Workers Union, Local 1657, AFL–CIO

Toni M. Hill *and* Medforce, a Division of MJP, Inc., Party in Interest. Cases 15–CA–13874, 15–CA–13885, 15–CA–13949, 15–CA–13974, 15–CA–14029, 15–CA–14069–1, 15–CA–14069–2, and 15–RC–7988

September 27, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On June 4, 1998, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel and the Charging Party Union filed answering briefs, and the Respondent submitted a reply brief to the two answering briefs. Additionally, the Acting General Counsel filed cross-exceptions to the judge's decision, to which the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified below, to modify the remedy,[3] and to adopt the recommended Order as revised and set forth in full below.[4]

We adopt the judge's findings that the Respondent engaged in widespread 8(a)(1) violations, except we clarify his findings regarding the Respondent's unlawful threats and we reverse his findings that the Respondent unlawfully promised benefits to employees. We further adopt the judge's findings that the Respondent violated Section 8(a)(3) and (1) by discharging employees Toni Hill, Ethel Husband, Brenda Kirk, Carl Langham, and Carla Wiggins and violated Section 8(a)(3), (4), and (1) by discharging employee Elaine Collins. For the reasons stated below, we agree with the judge that the circumstances of this case, and particularly the egregiousness of the Respondent's conduct, warrant the issuance of a *Gissel*[5] bargaining order and that, therefore, the Respondent also violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union on April 18, 1996,[6] when the Union requested bargaining based on a card majority. Contrary to the judge, we shall not require the Respondent to reimburse the Charging Party Union for litigation expenses incurred in connection with this proceeding.

1. Regarding the Respondent's alleged threats, the evidence shows that its dietary manager and admitted supervisor, Sonya O'Shea, told employee Langham that the Respondent would "sell the place first" before it bargained with the Union. We agree with the judge that O'Shea's remarks constituted an unlawful threat of plant closure as alleged in the complaint.

Furthermore, O'Shea told employee Alma Hayward that, in the event of a strike, the Respondent would not have to hire all the strikers back. O'Shea also stated: "I can just hire me [sic] a whole new staff of people"; that the striking employees could be out of work for "no telling how long"; and that the Respondent did not have to bargain with the Union. Hayward credibly testified that O'Shea repeated the same message at a meeting that 18–20 employees attended. With respect to these statements, the complaint alleged that, in April 1996, O'Shea violated Section 8(a)(1) by threatening employees with discharge and by advising them that it would not bargain with the Union if they selected the Union as their bargaining representative. We adopt the judge's finding that the Respondent unlawfully told employees that it would not have to bargain with the Union. Although the judge made no specific finding in his decision that, as alleged

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The Acting General Counsel, in his cross-exceptions, has urged the Board to modify the judge's remedy to require the Respondent to request that Medforce, a Division of MJP, Inc., an agency from which the Respondent obtains temporary employees, remove from its files any references to the Respondent's unlawful conduct in causing Medforce to remove employee Toni Hill from temporary employment at the Respondent's Midtown facility. Because we adopt the judge's finding that the Respondent violated Sec. 8(a)(3) of the Act by causing Hill's removal from her job at Midtown, we grant the Acting General Counsel's cross-exception and include this provision in the remedy.

[4] We shall issue a new Order and notice to reflect our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996); our modification (supra at fn. 3) in the remedy regarding Hill's discharge from the Respondent's Midtown facility; our clarification (infra) of the judge's findings that the Respondent made unlawful threats; our reversal (infra) of the judge's findings that the Respondent made unlawful promises of benefit; our conclusion (infra), contrary to the judge, that it is inappropriate to require the Respondent to pay the Union's litigation expenses here; and our recent decision in *Ferguson Electric Co.*, 335 NLRB No. 15 (2001).

[5] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[6] All dates are in 1996, unless otherwise noted.

in the complaint, O'Shea also threatened employees with discharge, his Conclusions of Law and provisions for it in his recommended Order and notice reflect this violation. Based on Hayward's credited testimony, we find that the precise 8(a)(1) violation committed through O'Shea's comments was that the Respondent threatened not to rehire any employee who engaged in protected strike activity.[7] Moreover, the Respondent reinforced this threat by telling employees that it would refuse to bargain with the Union, thereby conveying the message that a strike was the likely result of unionization and that employees would lose their jobs through striking. The Respondent's proven threat not to rehire strikers is closely related to the complaint allegations of threats to discharge, and the issue was fully and fairly litigated.[8] We shall therefore modify the judge's Conclusions of Law, recommended Order, and notice to reflect the violation found here.

Finally, the Respondent's director of nursing and admitted supervisor, Joan Branning, told a group of about 30 employees that if the Union came in the Respondent could no longer be lenient with employee problems, such as children or flat tires, that resulted in absence or tardiness. Branning said that the Respondent would not accept these excuses and that employees "would be written up and just dismissed without giving it a second thought." We adopt the judge's finding that, as alleged in the complaint, Branning's remarks unlawfully threatened employees with the loss of current benefits. However, because the judge failed to reflect this finding in his Conclusions of Law or include a provision covering it in his recommended Order and notice, we shall modify each of them accordingly.

2. The judge found that the Respondent violated Section 8(a)(1) of the Act on three occasions when its vice president and co-owner, Bill Roberts, allegedly offered promises of benefit to employees if they rejected union representation. Employee Alexis Dean testified that, in May, she and Roberts had a conversation about the organizing campaign and he made the following remarks about the prospects for collective bargaining:

> Then he said they couldn't make him agree to anything; that the only thing that he agree [sic] to that they was up against he [sic]—was the insurance and then later on he probably would give a raise. And that was all.

About May 7 or 8, Roberts asked employee April Ford whether she would help him and vote "No."[9] Roberts said that Ford would not be sorry if she did. Subsequently, on July 3, the Wall Street Journal published an article relating to the union election campaign at the Respondent's facility. The story, in pertinent part, described Roberts' reaction to the organizing campaign as follows:

> These days, Mr. Roberts is trying to sweeten the pot, offering workers a 50-cent raise and a health plan. "We should have had some health plan sooner, even though it's very expensive," he says.

We reverse the judge's findings that the Respondent made promises of benefit for the reasons that follow. First, regarding Roberts' conversation with Dean in April, we find that the comments attributed to Roberts to be nearly incomprehensible. Further, contrary to the judge, we do not find that these remarks, even when viewed in conjunction with the Respondent's other unlawful conduct, establish that he was offering benefits to employees in return for their rejection of union representation. To the extent that the credited comments may be understood, they are equally susceptible to the interpretation that the Respondent would agree to improve benefits within the framework of negotiations.

Second, we conclude that Roberts' remarks to Ford were too vague to rise to the level of an unlawful promise of benefits. And, third, Roberts' comments as reported in the Wall Street Journal article also do not constitute a violation. The record fails to establish that any of the unit employees either read or were even aware of the article in which the alleged unlawful comments appeared. In the absence of a showing of such awareness, we do not find that the article had a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Moreover, the particular statements concerning offering employees a wage raise and health plan, on which the judge relied in finding a promise of benefit, are not direct quotes attributable to Roberts.

In sum, we conclude that the Acting General Counsel has not met his burden of showing that the Roberts unlawfully promised employees increased wages or benefits in any of these instances. Accordingly, we dismiss these complaint allegations.

3. We agree with the judge that a *Gissel* bargaining order is necessary to remedy the effects of the Respondent's widespread unfair labor practices. In *Gissel*, the Supreme Court "identified two types of employer misconduct that may warrant the imposition of a bargaining order: 'outrageous and pervasive unfair labor practices' ('category l') and 'less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the

[7] *SCA Services of Georgia*, 275 NLRB 830, 854 (1985).
[8] *Baytown Sun*, 255 NLRB 154 fn. 1 (1981).
[9] We adopt the judge's finding that Roberts' inquiry constituted a coercive interrogation.

election processes' ('category II')."[10] The Court found that, in fashioning a remedy for category II cases, the Board can take into account the extensiveness of an employer's unfair labor practice violations in determining whether the "possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiments once expressed through cards would, on balance, be better protected by a bargaining order."[11]

In adopting the judge's recommendation that the Respondent's unfair labor practices here warrant the issuance of a *Gissel* bargaining order, we conclude, for the reasons stated below, that the Respondent's unlawful conduct demonstrates that the holding of a fair election in the future would be unlikely and that the "employees' wishes are better gauged by an old card majority than by a new election."[12] We find that this case falls within category II regarding which the Court has stated that the Board "can properly take into consideration the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future."[13]

As the Court mandated in *Gissel*, we have examined the severity and extensiveness of the Respondent's unfair labor practices and the likelihood that the coercive effects of these past practices would be erased by the use of traditional remedies. The evidence in this case shows that, shortly after the Union filed the petition in the representation case and demanded recognition on April 18, the Respondent embarked on a course of unlawful conduct clearly designed to dissipate majority support for the Union. Thus, the Respondent directed that its managers and supervisors systematically interrogate the unit employees concerning their union sentiments. We have adopted the judge's findings that 15 instances of coercive interrogations resulted from the Respondent's antiunion campaign. The Respondent's misconduct here also included "hallmark" violations of the National Labor Relations Act, such as threatening to discharge employees who exercised their Section 7 right to strike, threatening to sell the nursing home to avoid bargaining with the Union, and discharging six employees because of their union activities.[14] The Respondent discharged Hill the day after she complained that the Respondent was not bargaining in good faith during a mock bargaining session, and it later caused Medforce, an employment agency that provides temporary employees for the Respondent, to remove Hill from her assignment at another of the Respondent's facilities. Further, the Respondent discharged employees Collins, Husband, Langham, and Wiggins immediately after they donned union buttons expressing their support for the organizing campaign.[15]

The Respondent also committed other serious and pervasive unfair labor practices. It established a discriminatory no-access rule permitting procompany employees to leave their work stations and handbill on company property, while prohibiting prounion employees from engaging in similar conduct; informed employees during mock bargaining sessions that it would be futile to select the Union as their bargaining representative, and that it would not bargain with the Union if selected; engaged in surveillance of employees' union activities by the use of video cameras and a private police force; promulgated a rule prohibiting employees from wearing clothing reflecting union membership; charged an employee for prescriptions that she had previously received for free after she discussed the Union with management; and offered the Union an increase in wages and benefits for unit employees if it promised not to file further unfair labor practice charges or postelection objections.[16]

The Board has held that, where a substantial percentage of employees in the bargaining unit is directly affected by an employer's serious unfair labor practices, the possibility of holding a fair election decreases.[17] Here, the Respondent's serious unfair labor practices had a direct impact on a significant portion of the approximately 135 bargaining unit employees. Thus, O'Shea made her threat to discharge employees who went on strike in a meeting that 18–20 employees attended; Bran-

[10] *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1077 (D.C. Cir. 1996) (quoting *Gissel*, 395 U.S. at 613–614).

[11] *Gissel*, supra at 613, 614–615; *Cassis Management Corp.*, 323 NLRB 456, 459 (1997), enfd. mem. 152 F.3d 917 (2d Cir. 1998), cert. denied 525 U.S. 983 (1998).

[12] *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d at 1078.

The Respondent does not dispute the judge's finding that the Union had obtained valid authorization cards from 82 of the 147 unit employees and thus legitimately claimed to represent a majority of the bargaining unit when it requested recognition from the Respondent on April 18, 1996.

[13] *Gissel*, supra at 614.

[14] "Hallmark" violations, as described by the court in *NLRB v. Jamaica Towing*, 632 F.2d 208, 216 (2d Cir. 1980), are highly coercive violations that include plant closure or threat of plant closure, conferral of benefits, discharge, or threat of discharge, and the use of force in an attempt to discourage union activity.

[15] The Respondent also retaliated against Collins because she testified on the Union's behalf at a Board hearing in the representation case.

[16] In contrast to the allegation which we have dismissed pertaining to remarks in the Wall Street Journal by the Respondent's vice president and co-owner, Bill Roberts, the letter offering increased wages and benefits in exchange for refraining from filing unfair labor practice charges or objections was widely disseminated throughout the unit.

[17] See, e.g., *M.J. Metal Products*, 328 NLRB 1184 (1999); *Bonham Heating & Air Conditioning*, 328 NLRB 432 (1999), application for consent judgment granted 230 F.3d 1359 (6th Cir. 2000).

ning threatened 30 employees with the loss of benefits in a meeting with top management present; Smith informed employees at a general meeting at which the Respondent demonstrated mock bargaining that the Respondent would not bargain in good faith; and the Respondent discharged six union adherents. There were also 15 separate instances of unlawful interrogation. Significantly, the Respondent's installation of video cameras at its facility so that it could engage in surveillance of union activities interfered with the Section 7 rights of every employee who reported for work during the organizing campaign.

The coercive effect of the Respondent's unlawful activities is undeniable. The Respondent's widespread and egregious violations occurred throughout the 3-month period between the filing of the petition and the election date. Its systematic interrogation of the unit employees began shortly after the Union filed the petition. Within 2 weeks of that date, the Respondent discharged Hill in retaliation for her conduct at the mock bargaining sessions. The discharges of four more employees followed Hill's by 2 more weeks. This conduct "goes to the very heart of the Act" and is not likely to be forgotten by either the employees suffering the unlawful discharges or those who remained part of the work force.[18] The Respondent's quick retaliation against union supporters and an employee who simply shared with management her interest in learning more about the Union clearly establishes that the Respondent was "willing to go to extraordinary lengths in order to extinguish the union organizational effort" and that employees risked their jobs and livelihood if they persisted in their union support.[19]

The severity of the Respondent's conduct is heightened by the involvement of high-ranking officials. The evidence shows that the Respondent's co-owner, Steve Roberts, personally engaged in a series of coercive interrogations, hired a private police force and directed the installation of video cameras in order to engage in surveillance of employees' union activities, promulgated a rule prohibiting employees from wearing clothing bearing union insignia, and unlawfully discharged employees Langham and Wiggins. Also, Roberts' sister, Suzanne Hughes, the Respondent's administrator and another owner, personally interrogated an employee, offered wage increases and benefits to employees if the Union agreed not to file charges or election objections, and terminated employees Collins and Kirk. The antiunion message that Roberts and Hughes communicated to employees as the Respondent's owners was "highly coercive and unlikely to be forgotten."[20]

Although we are ordering that the Respondent reinstate the six discharged employees and provide them with backpay in order to make them whole for the Respondent's unlawful conduct, these remedies are not likely to erase the coercive and lingering effects of the violations. Neither the reinstated discriminatees nor those employees whose employment tenure continued without interruption but who witnessed the lengths to which the Respondent was willing to go to extinguish the organizing efforts would likely risk incurring the Respondent's wrath and a period of unemployment by engaging in union activities.[21] Indeed, as the judge found, the Respondent itself reinforced this message: it told its employees that it would not reinstate the discriminatees unless a Federal judge put a gun to its head.

These discharges and threats to sell the facility, to eliminate benefits, and not to rehire strikers are "hallmark" violations. As noted by the court in *Jamaica Towing*, such violations "will support the issuance of a *Gissel* order unless some significant mitigating circumstance exists."[22] The Board traditionally does not consider passage of time and turnover among bargaining unit employees in determining whether a bargaining order is appropriate, but rather assesses the appropriateness of this remedy based on the situation at the time the unfair labor practices were committed.[23] These issues, however, have concerned some courts in denying enforcement of our *Gissel* orders.[24] In this case, the Respondent does not claim that a *Gissel* order is unwarranted because of the passage of time between its unfair labor practices that justify this remedy and the issuance of our decision, or because of intervening turnover of employees or changes in management. Nor is there evidence here of

[18] *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

[19] *Consec Security*, 325 NLRB 453, 454 (1998), enfd. 185 F.3d 862 (3d Cir. 1999).

[20] Id. at 455.

[21] *M.J. Metal Products*, supra at fn. 18, 1187 (1999).

[22] *NLRB v. Jamaica Towing*, supra at fn. 16, 212; see also *Garvey Marine, Inc.*, 328 NLRB 991, 993 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001).

[23] *Salvation Army Residence*, 293 NLRB 944, 945 (1989), enfd. mem. 923 F.2d 846 (2d Cir. 1990).

[24] For example, the District of Columbia Circuit has stated that to justify the imposition of a *Gissel* bargaining order, the Board must find that a bargaining order is necessary *at the time it is issued* and support its finding with a "reasoned explanation that will enable [the reviewing court] to determine from the Board's opinion (1) that it gave due consideration to the employees' section 7 rights, which are, after all, one of the fundamental purposes of the Act, (2) why it concluded that other purposes must override the rights of the employees to choose their bargaining representatives and (3) why other remedies, less destructive of employees' rights, are not adequate."

Flamingo Hilton-Laughlin v. NLRB, 148 F.3d 1166, 1173 (D.C. Cir. 1998) (emphasis in original), quoting *NLRB v. Charlotte Amphitheater*, fn. 12, supra at 1078 (citations omitted).

any substantial turnover of management or employees, other than that caused by the Respondent's unlawful discharge of six employees.[25] Indeed, the record shows that, as of June 4, 1998, when the judge issued his decision, the Respondent's owners, Steven Roberts and Suzanne Hughes, still held the same positions they occupied when the unfair labor practices occurred between April and July 1996. The passage of time between the Union's election campaign and our decision today, though regrettable, does not detract from the necessity for restoring the status quo ante regarding the employees' desires for union representation that the Respondent dissipated through unfair labor practices.[26] The Board has repeatedly held that the validity of a *Gissel* order depends on an evaluation of the situation as of the time the employer committed the unfair labor practice violations.[27] We therefore find that issues regarding passage of time and changed circumstances are not pertinent here: significantly, the Respondent has not raised them and the record is silent on these points.[28]

In finding that the Respondent's disregard for the Act warrants a *Gissel* order, we have also examined the appropriateness of this remedy under the circumstances existing at the present time and we have considered the inadequacy of other remedies.[29] We have also given serious consideration to the employees' freedom to exercise their Section 7 right to choose or reject union representation. In *Gissel*, the Court specifically rejected the argument that a bargaining order is a punitive remedy that "needlessly prejudices employees' Section 7 rights."[30] The Court stated:

> If an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign. [Footnote omitted.] There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a decertification petition.

For, as we pointed out long ago, in finding that a bargaining order involved no "injustice to employees who may wish to substitute for the particular union some other . . . arrangement," a bargaining relationship "once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed," after which the "Board may . . . upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships." [395 U.S. at 612–613 (quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705–706 (1944).]

These statements clearly demonstrate that, in approving the Board's use of the bargaining order remedy in category II cases, the Supreme Court explicitly considered the Section 7 rights of employees who both supported and opposed union representation. The Court held that, if an employer's unfair labor practices have the tendency to undermine a union's majority strength and destroy election conditions, then "the only fair way to effectuate employee rights" is to issue a bargaining order. Thus, the Court safeguarded interests of employees favoring unionization through the imposition of a bargaining order. The opposing interests of employees who reject union representation are adequately safeguarded by their right to file a decertification petition pursuant to Section 9(c)(1) of the Act. Clearly, the *Gissel* decision reflects a careful balancing of the employees' Section 7 rights "to bargain collectively" and "to refrain from" such activity in category II cases as here.

We believe that, in approving the bargaining order remedy in category II cases, the *Gissel* Court fully took into account and balanced employees' freedom to exercise their Section 7 right to choose or to reject union representation. Nonetheless, we have also considered this factor based on the particular facts of this case. See *Douglas Foods Corp.*, 251 F.3d 1056 (D.C. Cir. 2001), remanding 330 NLRB No. 124 (2000). Given the extent and severity of the Respondent's unlawful efforts to kill its employees' desire for union representation, including "hallmark" violations of the Act, the bargaining order provides the proper remedy to effectuate the wishes of the majority who have chosen union representation and whose Section 7 rights have been infringed. At the same

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[25] "It would defy reason to permit an employer to deflect a *Gissel* bargaining order on the ground of employee turnover when that turnover has resulted from the employer's unlawful discharge[s]."

NLRB v. Balsam Village Management Co., 792 F.2d 29, 34 (2d Cir. 1986).

[26] See, e.g., *Salvation Army Residence*, supra at fn. 24, 945.

[27] Id.

[28] The District of Columbia Circuit made clear in *Charlotte Amphitheater* that it is a respondent's responsibility to bring to the Board's attention evidence of changed circumstances that would mitigate the need for a bargaining order. Thus, the court stated that, before issuing a bargaining order, "the Board has no affirmative duty to inquire whether employee turnover or the passage of time has attenuated the effects of earlier unfair labor practices." 82 F.3d at 1080. See also *Traction Wholesale Center Co.*, 328 NLRB 1058 (1999), enfd. 216 F.3d 92, 108 (D.C. 2000).

[29] *Garvey Marine, Inc.*, 328 NLRB at fn. 23, 1021.

[30] 395 U.S. at 612.

time, as the Court said, it does no "injustice" to the minority who may prefer "some other arrangement."[31]

Accordingly, we adopt the judge's determination that a *Gissel* bargaining order is an appropriate and necessary remedy in this case.

4. As part of his proposed remedy, the judge also recommended that the Respondent be required to reimburse the Union for its litigation expenses in this case. However, under existing precedent, the Board provides such a remedy only in cases involving frivolous defenses and in cases involving unfair labor practices that are flagrant, aggravated, persistent, and pervasive. See *Frontier Hotel & Casino*, 318 NLRB 857, 860–862 (1995), enf. denied in relevant part sub nom. *Unbelievable, Inc.*, 118 F.3d 795 (D.C. Cir. 1997). The Board held that the award of litigation expenses is not appropriate under the "frivolous" prong of this test if a respondent's defenses are deemed to be debatable in that they turn on credibility resolutions.

The judge in this case, in finding that the Respondent committed extensive violations of the Act, rejected the Respondent's defenses largely on the basis of credibility resolutions. Although, for the most part, we have adopted the judge's findings that the Respondent's defenses to the unfair labor practice allegations are lacking in merit, we do not find that they are frivolous. We therefore conclude that an award of litigation expenses is not warranted based on the assertion of frivolous defenses.

Turning to the character of the Respondent's misconduct, while we by no means minimize its serious and pervasive nature, which fully warrants the imposition of a *Gissel* bargaining order, we do not believe that the additional extraordinary remedy of litigation costs is necessary in this case to remedy the conduct, to restore the Union's economic strength, or to ensure meaningful bargaining.[32]

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusions of Law 4(c).

"4(c) Threatening not to rehire any employee who engages in protected strike activity."

2. Substitute the following for Conclusions of Law 4(e).

"4(e) Threatening employees that they would lose current benefits if they select the Union as their collective bargaining representative."

ORDER

The National Labor Relations Board orders that the Respondent, Cogburn Healthcare Center, Inc., Mobile, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their union membership, activities, and sympathies.

(b) Threatening its employees with closure of the facility if they select United Food and Commercial Workers Union, Local 1657, AFL–CIO as their bargaining representative.

(c) Threatening not to rehire any employee who engages in protected strike activity.

(d) Telling its employees that it would not have to bargain with the Union if they select the Union as their bargaining representative.

(e) Threatening its employees with the loss of current benefits if they select the Union as their bargaining representative.

(f) Engaging in surveillance of its employees' union activities by use of video camera equipment and a private police force.

(g) Informing its employees that it would be futile for them to select the Union by requiring them to engage in mock collective-bargaining sessions in which the employer representatives were instructed to say "No" to all union demands, and that the Company did not have to bargain in good faith with the Union.

(h) Promulgating a rule which prohibited employees from wearing clothing reflecting union membership without first getting its permission.

(i) Offering the Union an increase in wages and benefits for the unit employees if the Union agreed not to file unfair labor practice charges or objections to the election, and if the Union secured a waiver from the Board agreeing that it will not act on any such charges or objections.

(j) Permitting procompany employees to leave their workstations and handbill on company property, while prohibiting prounion employees from handbilling on company property.

(k) Discouraging membership in the Union or any other labor organization, by discharging employees because of their union activities or sympathies, or because they participate or testify in Board proceedings.

(l) Charging employees for prescription drugs that they previously had received for free.

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[31] See *Garvey Marine, Inc. v. NLRB*, supra; and *Traction Wholesale Center v. NLRB*, supra (enforcing Board's remedial affirmative bargaining orders under *Gissel* in view of employer's egregious and pervasive unfair labor practices.

[32] Compare *McGuire Steel Erection*, 324 NLRB 221 (1997); and *Bozeman Deaconess Hospital*, 322 NLRB 1107 fn. 2 (1997), with *Frontier Hotel & Casino*, supra at 862.

(m) Refusing to bargaining with the Union as the exclusive collective-bargaining representative of employees in the unit set forth below.

(n) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Elaine Collins, Toni Hill, Ethel Husband, Brenda Kirk, Carl Langham, and Carla Wiggins full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Collins, Hill, Husband, Kirk, Langham, and Wiggins whole for any loss of earnings and other benefits they suffered as a result of the unlawful discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to its unlawful discharges of Collins, Hill, Husband, Kirk, Langham, and Wiggins; request that Medforce, a Division of MJP, Inc., its provider of temporary employees, remove from Medforce's files any reference to the Company's unlawful conduct in causing Hill's removal from her employment at its Midtown facility; and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Within 14 days from the date of this Order, rescind its rule prohibiting employees from wearing clothing manifesting membership in the Union or any other labor organization without receiving its permission.

(e) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

> All full-time and regular part-time service and maintenance employees, including certified nursing assistants (CNAs), activity aides, dietary employees, cooks, maintenance employees, housekeeping employees, laundry employees, unit secretaries, care plan secretary, nursing service secretary, PBX operators, courier, pharmacy technician, and medical supply technician employed by us at our148 Tuscaloosa Street, Mobile, Alabama facility; excluding activities director, assistant activities director, admissions director, assistant admissions director, housekeeping supervisor, assistant housekeeping supervisor, dietician, assistant dietician, registered nurses (RNs) department heads, PBX supervisor, licensed practical nurses (LPNs), accounting assistants, professional employees, guards, and supervisors as defined in the Act.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place to be designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by Region 15, post at its various facilities copies of the attached notice marked "Appendix."[33] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 18, 1996.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held in Case 15–RC–7988 is set aside and that the representation petition in that case be dismissed.

[33] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. September 27, 2001

Wilma B. Liebman, Member

John C. Truesdale, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees about their union membership, activities, and sympathies.

WE WILL NOT threaten our employees with closure of the facility if they select the United Food and Commercial Workers Union, Local 1657, AFL–CIO as their bargaining representative.

WE WILL NOT threaten not to rehire any employee who engages in protected strike activity.

WE WILL NOT tell our employees that the Company would not have to bargain with the Union if they select the Union as their bargaining representative.

WE WILL NOT threaten our employees with the loss of current benefits if they select the Union as their bargaining representative.

WE WILL NOT engage in surveillance of our employees' union activities by use of video camera equipment and a private police force.

WE WILL NOT inform our employees that it would be futile for them to select the Union by requiring them to engage in mock collective-bargaining sessions in which our representatives were instructed to say "No" to all union demands, and that the Company does not have to bargain in good faith with the Union.

WE WILL NOT promulgate a rule which prohibits employees from wearing clothing reflecting union membership without first getting our permission.

WE WILL NOT offer the Union an increase in wages and benefits for the unit employees if the Union agrees not to file unfair labor practice charges or objections to the election, and if they secure a waiver from the Board agreeing that it will not act on any such charges or objections.

WE WILL NOT permit procompany employees to leave their work stations and handbill on company property, while prohibiting prounion employees from handbilling on company property.

WE WILL NOT discourage membership in the Union or any other labor organization, by discharging employees because of their union activities or sympathies, or because they participate or testify in Board proceedings.

WE WILL NOT charge our employees for prescription drugs that they previously had received for free.

WE WILL NOT refuse to bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit set forth below.

WE WILL NOT in any other manner, interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Elaine Collins, Toni Hill, Ethel Husband, Brenda Kirk, Carl Langham, and Carla Wiggins full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Collins, Hill, Husband, Kirk, Langham, and Wiggins whole for any loss of earnings and other benefits they suffered as a result of our unlawful discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to our unlawful discharges of Collins, Hill, Husband, Kirk, Langham, and Wiggins; request that Medforce, a Division of MJP, Inc., our provider of temporary employees, remove from its files any reference to our unlawful conduct in causing Hill's removal from her employment at our Midtown facility; and WE WILL, within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, within 14 days from the date of this Order, rescind our rule prohibiting employees from wearing

clothing manifesting membership in the Union or any other labor organization without receiving its permission.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time service and maintenance employees, including certified nursing assistants (CNAs), activity aides, dietary employees, cooks, maintenance employees, housekeeping employees, laundry employees, unit secretaries, care plan secretary, nursing service secretary, PBX operators, courier, pharmacy technician, and medical supply technician employed by us at our 148 Tuscaloosa Street, Mobile, Alabama facility; excluding activities director, assistant activities director, admissions director, assistant admissions director, housekeeping supervisor, assistant housekeeping supervisor, dietician, assistant dietician, registered nurses (RNs) department heads, PBX supervisor, licensed practical nurses (LPNs), accounting assistants, professional employees, guards, and supervisorsas defined in the Act.

COGBURN HEALTHCARE CENTER, INC.

Jeffrey R. DeNio, Esq. and *Patricia Adams, Esq.,* for the General Counsel.

J. Patrick Logan, Esq., J. Frederic Ingram, Esq., and *Patricia Burke, Esq. (Burr & Forman*), of Birmingham, Alabama, for the Respondent/Employer.

Patrick F. Clark, Esq. (Cooper, Mitch, Kuykendall & Whatley), of Birmingham, Alabama, for the Charging Party/Petitioner.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The unfair labor practice charges listed above were filed at various times[1] by United Food and Commercial Workers Union, Local 1657, AFL–CIO (the Union, or Petitioner), except for the charge in Case 15-CA-14029, which was filed by Toni M. Hill, an Individual (Hill).

After the issuance of three prior complaints, a fourth consolidated complaint issued on December 30. It alleges that Cogburn Healthcare Center, Inc. (Respondent, or the Employer) engaged in unlawful interrogation of its employees concerning their union membership, activities, and sympathies, and unlawful surveillance of its employees' union activities by use of a private police force and video cameras.

The complaint alleges that Respondent threatened employees with closure of its facility, and with discharge and loss of benefits if they selected the Union as their bargaining representative. Respondent unlawfully told its employees that it would not have to bargain with the Union if the employees selected it as their bargaining representative, advised them that it would not have to come to an agreement with the Union on anything, and informed them that it would be futile for them to select the Union as their bargaining representative.

The complaint also alleges that Respondent solicited employee complaints and grievances, and promised increased benefits and improved terms and conditions of employment if the employees rejected the Union as their bargaining representative. It also solicited employees to waive their rights under the National Labor Relations Act (the Act).

The complaint as amended at the hearing further alleges that Respondent unlawfully promulgated and enforced a rule prohibiting employees from wearing clothing reflecting union membership, and, by a police officer, told employees that only employees engaged in antiunion campaigning would be permitted on the grounds of its facility.

In addition, the complaint alleges that Respondent discharged employee Toni Hill on May 2, and caused its agent, Medforce, a Division of MJP, Inc. (Medforce), to discharge Hill from another of its facilities on August 13, because of her union activities and sympathies and because her name was listed on an unfair labor practice charge. It discharged Ethel Husband and Carla Wiggins on May 16, and Carl Langham on May 17, because of their union activities and sympathies. Respondent assigned employee Elaine Collins to more onerous work on May 16 and effectively discharged her on May 17 for the same reason and because she testified at the representation case listed above. It discriminated against employee Brenda Kirk by reprimanding her, deducting the cost of her prescription drugs from her paycheck, and by discharging her on July 8, for the same reason. Further, the complaint alleges, Respondent issued written warnings to all its employees who failed to attend, or promptly to attend, a mandatory antiunion meeting.

Finally, the complaint alleges, a majority of the employees, in an appropriate unit on April 18, selected the Union as their bargaining representative by signing authorization cards; and the Union demanded bargaining with Respondent as such representative. Respondent unlawfully refused to bargain, the complaint alleges. Because of the serious nature of Respondent's unfair labor practices, the complaint contends, the possibility of conducting a fair rerun election[2] is slight, and the rights of employees would best be served by issuance of a bargaining order.

In Case 15–RC–7988, pursuant to a petition filed on April 18, a Board election by secret ballot was conducted on July 19. The tally of ballots showed that of approximately 135 eligible voters, 52 cast votes for and 72 against the Petitioner. There were seven challenged ballots, which were insufficient in num-

[1] All dates herein are in 1996 unless otherwise stated. The charge in Case 15-CA-13874 was filed on May 17, and amended charges on June 7 and June 21; the charge in Case 15-CA-13885 on May 22, and an amended charge on June 21; the charge in Case 15-CA-13949 on June 20, and an amended charge on July 29; the charge in Case 15-CA-3974 on July 11, and an amended charge on July 29; the charge in Case 15-CA-14029 on August 21; the charge in Case 15-CA-14069–1 on September 25; and the charge in Case 15-CA-14069–2 on September 25.

[2] See infra.

ber to affect the results of the election. The Petitioner filed timely objections to conduct affecting the election. On August 23, the Acting Director for Region 15 issued an order directing a hearing on the objections, and consolidating such hearing with the unfair labor practice charges.

A hearing on these matters was conducted before me in Mobile, Alabama, on March 17–21, July 28 through August 1, and September 22–24, 1997. Thereafter, the General Counsel, the Charging Party, and the Respondent filed briefs. On the basis of the entire record, including my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is an Alabama corporation, with offices and places of business in Mobile, Alabama, entitled Cogburn Healthcare Center (facility), and Cogburn Nursing Center Midtown (Midtown), where it is engaged in the operation of nursing homes providing medical care. During the 12-month period ending May 31, 1996, Respondent derived gross revenues in excess of $100,000, and purchased and received at its Alabama facilities goods valued in excess of $50,000 from points outside the State of Alabama. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED VIOLATIONS OF SECTION 8(A)(1)

A. The Alleged Unlawful Interrogation

1. Applicable principles

In an early statement of the principles to be applied in such cases, the Board stated:

> In our view, the test is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act. The fact that employees gave false answers when questioned, although relevant, is not controlling. The Respondent communicated its purpose in questioning the employees—a purpose which was legitimate in nature—to the employees and assured them that no reprisal would take place. Moreover, the questioning occurred in a background free of employer hostility to a union organization. These circumstances convince us that the Respondent's interrogation did not reasonably lead the employees to believe that economic reprisal might be visited upon them by Respondent. [*Blue Flash Express*, 109 NLRB 591, 593 (1954).]

The Board distinguished its decision in *Blue Flash* from a contrary holding, in which the interrogation took place a week before a Board election, and the employer failed to give the employees any legitimate reason for the interrogation or assurances against reprisal (id.).

The Board reiterated this standard in *Rossmore House*, 269 NLRB 1176 (1984), where it rejected a per se approach to interrogation of open union adherents and concluded that the test was whether, under all of the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce, employees in the exercise of rights guaranteed by the Act. (Id. at 1177.) The Board stated some of the factors to be considered:

> Some factors which may be considered in analyzing interrogations are: (1) the background; (2) the nature of the information sought; (3) the identity of the questioner, and (4) the place and method of interrogation. See *Bourne v. NLRB*, 332 F.2d 47 (3d cir. 1964). These other relevant factors are not to be mechanically applied in each case. Rather, they represent some areas of inquiry that may be applied in applying the Blue Flash test of whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. [Id., 269 NLRB at 1178 fn. 20.]

The Board has concluded that interrogation of a known union adherent's union sympathies was coercive. *Baptist Medical System*, 288 NLRB 882 (1988). In *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), the Board applied the same test to interrogation of employees who were not open union adherents. The Court of Appeals for the Fifth Circuit recently affirmed a Board finding of coercive interrogation because of the employer's promulgation of an illegal rule, and a history of attempting to engage in the same practice in the past. *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359 (5th Cir. 1990), enfg. in part 294 NLRB 462 (1989).[3]

2. The beginning of the campaign, and the Company's response

Union International Representative Juleeann Jerkovich testified that the Union's campaign began on October 12, 1995. On that date, she and another International representative began passing out union leaflets at the intersection of Lorraine and Tuscaloosa Streets in Mobile, where Respondent's facility is located. They passed out cards, and talked to employees leaving the building.

About 2 weeks later, on October 24, 1995, according to former house supervisor Carol Purvis, the company department heads and the Company's owner met with a consultant named Jay Cole, at which time the Union was discussed. Several group meetings with Cole were held throughout the winter. Beginning in late winter, Cole held individual meetings with supervisors in the facility's conference room, which he used as

[3] Citing *Bourne*, supra the court listed eight factors to be considered in determing whether interrogation has been coercive: (1) the history of the employer's attitude toward its employees; (2) the nature of the information sought or related; (3) the rank of the questions in the employer's hierarchy; (4) the place and manner of the conversation; (5) the truthfulness of the employee's response; (6) whether the employer had a valid purpose in obtaining the information sought; (7) whether a valid purpose, if existent, was communicated to the employee; and (8) whether the employer assured the employee that no reprisals would be forthcoming. Although some of these factors were not satisfied, the court in *NLRB v. Brookshire Grocery*, supra, agreed with the Board that the interrogation had been coercive.

an office. Cole told Purvis to try to find out whether specific employees were for or against the Union. He gave her lists of employees with whom to speak, and instructed her to record on these lists the remarks made by particular employees. The night supervisor was given a similar list. Cole did not testify, and I credit Purvis' uncontradicted testimony.

3. The interrogation

a. Sonya O'Shea

Sonya O'Shea was the dietary manager and an admitted supervisor. Some time after the filing of the petition, O'Shea called employee Alma Hayward into her office, and asked how Hayward and all the employees felt about the Union. She informed Hayward, according to the latter, that she knew Hayward was on the organizing committee, had attended union meetings, and was soliciting signatures on authorization cards within a week after the filing of the petition.

O'Shea, together with an assistant dietary manager, held a meeting in O'Shea's office with employee Shanavie Thomas. O'Shea asked Thomas what her position was on the Union, and whether she had signed an authorization card. Thomas declined to answer on the ground that the Company would harass her if she supported the Union, and the employees would alienate her if she did not support it.

O'Shea called in alleged discriminatee Carl Langham in April and, according to Langham, showed him a memo from Company Administrator Hughes about the Union and asked him how he felt about the Union. Langham, a union member, replied that he was "100% for (the Union)." About a month later, Respondent discharged him, as related hereinafter.

Respondent argues that "these conversations were extremely casual as part of the normal day-to-day interaction on the job."[4] This is an inaccurate description of these conversations, in light of Cole's instructions, the fact that the employees were called into a supervisor's office for the conversation, and in light of Respondent's numerous other unfair labor practices set forth in the record. I conclude, that these statements constituted unlawful interrogation.

b. Steve Roberts

Steve Roberts was an owner and vice president of Respondent, an admitted supervisor. He engaged in a series of interrogations, according to the testimony of various employees. In early May, he asked employee Shenece McCollum in his office how she felt about the Union, and other questions. McCollum replied that she did not have to answer. At about the same time, Roberts asked employee April Ford whether she had been talking with union representatives, and how she would vote. Ford, who had met with union organizers, feared retaliation, and did not answer. Roberts also interrogated employee Barbara Williams at about the same time. He asked her whether she had ever been in a union, and how she would vote in the election. Williams did not answer. About a month before the election, i.e., in mid-June, Roberts, after reprimanding employee Marilyn McCarty for failing to attend an antiunion meeting, asked her how she would vote. McCarty refused to answer. Alexis Dean testified that Roberts asked her in May how she felt about the Union.

Roberts denied that he asked April Ford *how* she was going to vote, but merely asked her *for* her vote. Respondent argues that such a request does not constitute interrogation.[5] On the contrary, an employer's request that an employee vote for the employer calls for a reply, and thus may appropriately be characterized as an inquiry. I conclude that Roberts unlawfully interrogated Ford.

Roberts denied that he asked McCollum *how* she was going to vote, and Respondent argues that McCollum's testimony constitutes no more than her subjective impression of the conversation.[6] On the contrary, asking an employee how she feels about the Union is an explicit inquiry. I credit McCollum, and conclude that Roberts unlawfully interrogated her.

Roberts admitted having a conversation with Barbara Williams about the Union, but merely told her that the Company was providing meetings to inform employees about the Union. He denied asking Williams how she was going to vote, or how she felt about the union campaign. Williams was the more credible of the two witnesses, and I credit her version of the conversation. For the reasons given above, I conclude that Roberts unlawfully interrogated Williams.

Roberts denied knowing an employee named Alexis Dean, or talking to any such person. However, Dean testified that she was employed at Respondent's facility in April and May, and that Carol Purvis was her supervisor. Purvis said that Roberts wanted to see her, and she met with him in a room at the end of a hall. I find that Dean was in fact an employee, and that Roberts unlawfully interrogated her in May.

c. Prentice Smith

Prentice Smith was the administrator at Respondent's Midtown facility. Alan Wolfe, a courier at the facility, described Smith as his supervisor.[7] Wolfe testified without contradiction that in mid-May, Smith asked him how he felt about a Union coming to Midtown. Wolfe replied that he "didn't know." Wolfe described his relationship with Smith prior to this conversation as "great," but averred that it was completely changed thereafter. The managers at the facility on Tuscaloosa street stopped talking to him, Wolfe testified.

I credit Wolfe's testimony, and conclude that Smith unlawfully interrogated him.

d. Joan Branning

Joan Branning was director of nursing and an admitted supervisor. Employee Marilyn McCarty testified that she and another employee were in the utility room about 2 weeks before the election, when Branning entered the room. She asked the employees how they were going to vote in the election, and they refused to answer.

Employee Barbara Williams testified that about 2 weeks before the election Branning had a conversation in the hallway with four employees, including Williams. Branning asked how

[4] R. Br. 42.

[5] R. Br. 45.

[6] Ibid.

[7] I conclude that Prentice Smith was a supervisor within the meaning of the Act.

they were going to vote in the election. As she asked this question, Branning held a clipboard, on which she was writing. According to Williams, the employees responded that they were going to vote against the Union because they were afraid they would lose their jobs if they favored the Union.

Branning denied asking these questions. McCarty and Williams were more believable witnesses than Branning. I credit their testimony and conclude that Branning engaged in unlawful interrogation.

e. Janet Doughdrill

Janet Doughdrill was director of activities and an admitted supervisor. Alleged discriminatee Brenda Kirk testified that Doughdrill came to her in the spring of 1996, and asked whether Kirk had heard anything about the formation of a union and whether employees were trying to recruit other employees to join the Union. Doughdrill asked Kirk to report any instances of recruiting. Doughdrill also asked her how she was going to vote, if she was determined to be an eligible voter.[8] Kirk replied that if she was found to be eligible she would investigate both sides of the issue, make her own decision, and not communicate it to anybody.

Doughdrill acknowledged talking to Kirk about unions, but contended that she merely asked Kirk whether the latter was aware of meetings about unions being conducted by the Company, and that it was prepared to give employees any information they desired. Doughdrill denied asking Kirk about recruiting of employees by other employees, or how Kirk was going to vote.

Based on her demeanor, Kirk was the more credible of these witnesses, and I credit her testimony and find that Doughdrill unlawfully interrogated her.

f. Suzanne Hughes

Suzanne Hughes was Respondent's administrator, an owner of the Company, and an admitted supervisor. Employee Marilyn McCarty testified that Hughes called her to the latter's office prior to the election, and asked her how she was going to vote. McCarty replied that she was not telling anybody about her voting intentions.

On direct examination, Hughes denied that she called anybody to her office, but on cross-examination admitted that she met with employees who, she believed, were undecided. Hughes agreed that one of these was Marilyn McCarty. I credit McCarty, and find that Hughes unlawfully interrogated her.

g. Ann Bell

Ann Bell was Respondent's director of admissions, and an admitted supervisor. On May 16, a coworker placed a union button on the collar of alleged discriminatee Carla Wiggins. According to Wiggins' uncontradicted testimony, Bell came through the serving line, and asked Wiggins what her button said. Other employees were present. Wiggins replied to Bell that the button said, "Fight for Dignity." Wiggins was later discharged because of a similar inquiry by Steve Roberts.

In addition, Respondent demonstrated hostility to the wearing of prounion T-shirts.[9] This inquiry was not casual or friendly, and violates Section 8(a)(1). *Southwire Co.*, 277 NLRB 377, 379 (1985).

h. Mobile police officers

(i) The hiring of Mobile police officers

On April 23, Respondent initiated the use of off-duty Mobile police officers at its facility on Tuscaloosa Street. This involved about 35-armed officers, and continued until about June 2.[10] The ostensible purpose was to provide "security" at the facility. Respondent's co-owner Steve Roberts testified that he "hired" these officers. His communications pertaining to them were made to Sergeant Raymond McInnis, to whom he gave instructions. McInnis testified that he is sometimes "employed by persons other than the Mobile Police Department, when he has to work extra jobs." This is permitted by Mobile Police City regulations, according to McInnis.

I infer that these officers were paid by Respondent for the time worked at its facility, and I find that they were employees and agents of Respondent during such periods of employment. *Thunderbird Hotel Co.*, 152 NLRB 1416, 1422 (1965).

(ii) Officer Luther McCoy and Steve Roberts

Employee Shenece McCollum left Respondent's facility on May 16. She was wearing Respondent's uniform. Union Organizer Jerkovich and other organizers were standing at the intersection of Tuscaloosa and Lorraine Streets. They waved at McCollum, and she waved back.

Co-owner Steve Roberts and Officer Luther McCoy were standing outside. McCoy testified that Roberts said he did not know the individual who had left the building, and directed McCoy to ask who she was. McCoy acknowledged that she was wearing a uniform. McCollum was sitting in her car ready to depart, when McCoy approached her. She rolled down the window, and McCoy asked her to tell him her name. According to McCoy, she asked him what she had done wrong. The officer replied that she had not done anything wrong—he simply wanted to know her name. McCollum started to leave, and McCoy wrote down her tag number. He asked Roberts to check the number. Roberts did so, and informed McCoy that McCollum was an employee.

The next day Roberts called McCollum to his office, and informed her that he had written a reprimand for her failure to answer McCoy's question, and also a transfer to the nursing floor. According to McCollum's credible testimony, Roberts told her that the police were there for security reasons due to the union activity. After McCollum responded, Roberts said that she did not have a "bad attitude," and tore up her reprimand. He instructed her to respond to future police inquiries.

Roberts' instruction to McCoy to determine McCollum's identity clearly establishes the officer as Respondent's agent. McCollum's sympathy with the union movement was made evident to Roberts by the exchange of a wave of hands between McCollum and the union agents standing in the roadway. It

[8] Kirk was a sitter for the mother of Suzanne Hughes, one of Respondent's owners, and her eligibility had not been determined at the time of this conversation.

[9] Infra, sec. G.

[10] GC Exh. 41. The hours worked by each officer are detailed.

was obvious to Roberts and McCoy that she was a Cogburn employee from the fact that she was wearing a company uniform. McCollum had not engaged in any misconduct, as was acknowledged by McCoy's statement that she had not done anything wrong. In these circumstances, McCoy's questions, and the recording of McCollum's license tag number constituted unlawful interrogation. *Bakersfield Memorial Hospital*, 315 NLRB 596, 604 (1994). The coercive effect of this interrogation was augmented by Roberts' order that McCollum was to cooperate with the police, and by his display of a reprimand (which he withdrew) and a threat of a transfer. The combination of McCoy's and Roberts' actions gave McCollum the impression that her Union activities were under surveillance.

B. The Restriction of Employees Allowed on Company Property to Those in Favor of the Company

1. The evidence

Current employee Shanavie Thomas was scheduled to work on July 3. She arrived at about 6 a.m. and began handbilling for the Union in the driveway, together with union representative Jerkovich and other Company employees. At about 6:30 a.m. other employees came out of the building and started passing out handbills in favor of the Company. Two of them were Delonda Williams and Latonya Reed. They walked up to about 5 feet from the street, on the driveway. The prounion employees then positioned themselves opposite the procompany employees and continued handbilling.

Mobile police officer Todd Friend approached the employees and said that any who were not on the clock and not handing out flyers for the Company had to get off the property. Latonya Reed claimed that she was on the clock. Officer Friend did not recall anybody saying this.

Friend had a conversation with Union Representative Jerkovich, and then went inside the building. He returned, and said that "only the people for the Company were allowed to be on the property," according to Shanavie Thomas. The procompany employees returned to the building.

Officer Friend testified initially that there were about six individuals handbilling in front. Three of them said that they were employees. Friend's testimony then becomes unclear. He first testified that employees and nonemployees were not allowed on the property and he told them to leave the premises or they would be arrested. Asked for the reason, Friend replied, "because they were pro-union . . . (and) were employees that were off duty." Friend never asked any employee whether he or she was on duty. He went back inside the building for instructions, and returned with the same order - employees not on duty would be arrested if they did not leave the premises. However, Friend's final averments were that prounion employees not on duty were to be ordered off the property, but that there was no such requirement for procompany employees who were not on duty.

2. Factual and legal conclusions

Shanavie Thomas was a current employee and a more reliable witness than Officer Friend. The latter, after a melange of confusing testimony, ended up in essentially the same position as Thomas—there was no requirement that off-duty employees had to leave property if they were for the Company, or, as Thomas put it, Friend said that only people for the Company were allowed to be on the property. This was obvious disparate treatment of the prounion employees.

The "off-duty/on-duty" factor mentioned in the evidence is irrelevant. In the first place, this was never cited by Friend as the only factor and was ultimately abandoned. Even if it were a factor, the result would be the same - Respondent permitted employees on duty to leave their work in order to handbill for the Company outside their workplace, but evicted prounion employees about to begin work. This amounted to selective enforcement of a no-access rule and violated Section 8(a)(1). *Hickory Creek Nursing Home*, 295 NLRB 1144, 1149 (1989).

C. The threats

Carl Langham testified that, in the April meeting he had with Dietary Manager Sonya O'Shea, she showed him a memo giving the "negative part about the Union." Respondent's administrator Suzanne Hughes did not have to bargain with the Union if it became the employees' representative, and would "sell the place first." Alma Hayward testified that, at about the same time, O'Shea told her that, in the event of a strike, O'Shea would not have to hire all the strikers back. "I can just hire me a whole new staff of people." The striking employees could be out of work for "no telling how long." The Company would not have to bargain with the Union. According to Hayward, O'Shea said essentially the same thing at a meeting with 18–20 employees. There was a heated argument, and O'Shea ordered Hayward to leave the meeting. She declined to do so, and O'Shea ultimately left.

O'Shea denied making these statements. Langham and Hayward were more believable witnesses, and I credit their testimony.

Alleged discriminatee Brenda Kirk testified that she attended a meeting called by the Company on the evening of July 2. The top managers and about 30 employees were present. The Company passed around $1000 in cash to the employees, and said that this was the amount that would be taken out of their pay annually if the Union won the election. Director of Nursing Joan Branning said that, if the Union came in, the Company could no longer be lenient with employee problems such as children, or flat tires. The employees would not be able to call in and excuse absence or tardiness. "They would be written up and just dismissed without giving it a second thought."

O'Shea's statement that the Company did not have to bargain with the Union, and would "sell the place first" was a flagrant violation of Section 8(a)(1). *Adam Wholesalers*, 322 NLRB 313 (1996). Branning's statements constituted a threat of loss of employee benefits if the Union came in, and was similarly unlawful.

D. The Electronic Surveillance

1. The evidence

As indicated, Respondent's facility is at the intersection of Tuscaloosa and Lorraine Streets. The front entrance is on Tuscaloosa Street, where there is a visitor parking area on company property. There is a loading zone on the Lorraine Street side,

and an ambulance entrance and employee parking area on the side opposite Lorraine Street.[11]

Respondent's co-owner and administrator, Suzanne Hughes, was asked about security issues. She could not remember exact dates, but testified about events that occurred several years prior to the advent of the union campaign. In about 1994, an employee's husband came into the facility and assaulted the employee. At about the same time, two employee television sets were stolen, and a vendor was robbed near the loading zone adjacent to Lorraine Street. Officer Todd Friend testified that Lorraine Street, "a dark street," was a security problem. Employees requested more lighting on the Lorraine Street side of the building, but no action was taken on this request. In April or May 1996, a black Cadillac was observed entering and leaving the premises. Co-owner Hughes was asked whether she called the attention of the police to any problems they should check out. She replied, "No."

After the arrival of the policemen on April 23, an employee was detected stealing some curtains, and leaving by the Lorraine Street exit. He was discharged. Someone placed some wadding in a laundry drain, and caused minor flooding. Hughes could not recall any incident, which took place on the parking lot at the front of the building, facing Tuscaloosa Street.

On May 29, co-owner Steve Roberts distributed a letter to employees telling them that it was necessary for respondent to install security cameras because of union violence and employee damage to property.[12] Roberts admitted at the hearing that he had no direct evidence of the allegations made in the letter.

On May 30, Respondent mounted three video cameras on the roof of its facility. All faced towards the front of the building on Tuscaloosa Street, where union handbilling was taking place, and could not be turned to face Lorraine Street. In addition, a monitor and a videocassette recorder were installed in Roberts' office. The value of the equipment was approximately $7500. The incidents portrayed by the cameras were recorded on tape, and Roberts' reviewed these tapes.

2. Legal conclusions

Respondent argues: "The purpose for the installation of the cameras was to record evidence of illegal activity if any occurred. The cameras could monitor those entering and exiting the property and, accordingly, would aid in determining who was responsible for any security problems or property damage."[13] The difficulty with this argument is that both Suzanne Hughes and Steve Roberts admitted that they did not have any evidence of such conduct. Hughes vaguely recalled some events in the past, but did not install security cameras at that time. If Respondent had any security problem, it was the absence of lighting on the Lorraine Street side of the building. However, Respondent ignored employee requests for additional lighting in that area, and, when it installed video cameras, did not even attempt to point them in that direction.

Respondent next argues that it was merely "collecting evidence," and "documenting anticipated unprotected illegal activity," citing *Crown Cork & Seal Co.*, 254 NLRB 1340 (1981), enfd. 691 F.2d 506 (9th Cir.1982). However, that decision comes to a conclusion directly opposed to Respondent's argument. The Board's position on Respondent's shifting rationale has been stated as follows:

> [W]e note that it is well established that, absent legitimate justification, an employer's photographing of his employees while they are engaged in protected concerted activity constitutes unlawful surveillance (authorities cited) We further find that Respondent failed to establish any legitimate justification for its actions. In this regard, Studohar, who directed that arrangements be made for photographing the demonstration, testified that he did so for the purpose of securing evidence for possible litigation. However, he also admitted that he had no reason to anticipate that the participants in the demonstration would engage in violent or other illegal conduct. Furthermore, . . . the employees did not in fact engage in such conduct, and Respondent did not institute any legal action as a result of the demonstration. In similar circumstances, the Board has consistently rejected the defense raised by Respondent here, Thus, it is well settled that "purely anticipatory photographing of peaceful picketing in the event something (might) happen does not justify an (employer's) conduct when balanced against the tendency of that conduct to interfere with the employees' right to engage in concerted activity." *United States Steel Corporation*, 255 NLRB 1338 (1981).

Respondent's objective in installing the security cameras was to engage in surveillance of its employees' union activities. This is clearly established by (1) its pointing the cameras at the Union activity on Tuscaloosa street and its failure to position any cameras or lights on the "dark" Lorraine street side of the building, despite the requests of its employees that it do so; (2) the installation of the cameras immediately following the beginning of union activity in the street outside its facility; and (3) its extensive unfair labor practices in this case. I conclude that the video camera photographing and taping of its employees' activities violated Section 8(a)(1).

E. The Mock Bargaining Sessions and the Statement to Employees that Selection of the Union Would be Futile

On May 1 and 2, Company administrator Prentice Smith presented mock collective-bargaining session for the edification of employees. He obtained a script for these sessions from man-

[11] GC Exh. 10.

[12] Roberts' letter reads in relevant part:

> Due to union violence here at Cogburn and the employee property damage reported recently, it has become necessary for us to install security cameras outside the facility. These security cameras will not become operational until Thursday afternoon, May 30th.
>
> Many of our employee have come forward and asked to have security in the parking lot areas around our facility due to the damage to personal cars parked in our area. We are sorry that we had had to do this. I can't say for sure that the Union is causing this damage, but this personal property damage did not start until the Union showed up at our door. [GC Exh. 9.]

[13] R. Br. 30.

agement consultant Jay Cole.[14] A poster used at the sessions portrays an elderly man saying "How long would I have to wait?" (for a contract) and the text answers the question: "Who knows? The employees of 71 companies represented by (the Union) have been waiting as long a 27-months. The Union promised fast results, but they promised what they can't deliver. Vote "NO."[15]

Smith instructed the participants to follow the script, which automatically mandated company rejection of every union offer. When a team representing the Company asked the reason, Smith did not provide any explanation. Employees credibly testified that Smith told them that Respondent did not have to bargain in good faith.

Smith's text of the bargaining process, and his diligence in following the text amount to a statement that Respondent would refuse any union bargaining request. This constituted an anticipatory refusal to bargain in good faith and unlawfully threatened that employee attempts to organize would be an exercise in futility. *Kona 60 Minute Photo*, 277 NLRB 867, 868 (1985); *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 512 (1995). I so find.

F. The Promise of Increased Benefits if the Employees Rejected the Union

On July 3, about 2 weeks before the election, the Wall Street Journal ran an article on the campaign. It interviewed Union representative Jerkovich and Respondent's co-owner, Bill Roberts. The article described Roberts' actions as follows:

> These days, Mr. Roberts is trying to sweeten the pot, offering workers a 50-cent raise and a health plan. "We should have had some health plan sooner, even though it's very expensive," he says.[16]

At the hearing, Roberts admitted that he had been interviewed by a reporter from the newspaper, that he read the article, and that he did not recall being misquoted. This constitutes an admission that Respondent promised benefits in return for employee rejection of the Union. The Company combined this promise with the threats described above in "a classic 'carrot and stick' approach with respect to the incentive plan." *Adam Wholesalers*, supra, 322 NLRB at 314.

I have found that Steve Roberts unlawfully interrogated Alexis Dean in May. Dean also testified:

> Then he said they couldn't make him agree to anything; that the only thing that he agree to that they was up against he [sic]—was the insurance and then later on the probably would give a raise. And that was all.

Respondent argues that this statement, "even if made, would indicate that . . . health insurance and a raise would be the likely results of negotiations with the union. This can hardly be interpreted a promise of benefits if the union does not win the election."[17]

Respondent's argument is inconsistent with its mock bargaining sessions, which communicated to employees that every union request would be rejected by the Company, and with its statement to employees that it did not have to bargain in good faith. In light of this position communicated to employees, Roberts' statement to Dean could not reasonably be interpreted as an assertion that, nonetheless, the company would agree to an increase in benefits during negotiations. The more likely meaning of Roberts' statement is that Respondent would grant these benefits in return for employee rejection of the Union. I so find, and conclude that Respondent thereby violated Section 8(a)(1).

April Ford testified that, on about May 7 or 8, Steve Roberts asked her whether she would help him and vote "No." Asked whether Roberts promised her anything, Ford testified that he told her she would not be sorry.

Respondent argues that this statement by Roberts had no reference to any specific benefit, and did not constitute a promise of a benefit, citing *Flamingo Hilton-Laughlin*, 324 NLRB 72 (1997).[18] However, in that case, the employer's representative told employees that he would like to be evaluated on his management style. This is different from Roberts' asking Ford to help him by voting "No," and telling her that she would not be sorry. The Board has held that although employer statements may not be unlawful in and of themselves, "they may be unlawfully coercive if uttered in context of other unfair labor practices that 'impart a coercive overtone to the statements' (authority cited) . . . (including) promising to grant benefits if the Union was rejected." *Reno Hilton*, 319 NLRB 1154 (1995).

In the context of Respondent's many unfair labor practices in this case, including Bill Roberts' offer to "sweeten the pot" with a 50-cent raise and a health plan, I conclude that Steve Roberts' asking April Ford to help him by voting against the Union, and telling her that she would not be sorry, constituted an unlawful promise of benefits.

G. The Rule Requiring Permission to Wear Clothing Reflecting Union Membership

1. The evidence

The complaint as amended at the hearing alleges that Respondent violated Section 8(a)(1) by promulgating a rule prohibiting its employees from wearing clothing reflecting union membership.

At the time of the hearing, Marilyn Randolph was employed by Respondent as an activities assistant. There were no uni-

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[14] The script outlines the collective-bargaining process as follows:

> Set (some) employees at the bargaining table, some to represent the union and some to represent the company.
>
> Start the bargaining with the union side, the union side must present their concerns to the company side.
>
> Union side expresses their interest. Company side states "NO" to the union interest. Now the union side must determine their next step.
>
> Either the union must accept the company side or strike.
>
> The company side can propose a decrease in wages and benefits. Again, the union must decide (to) take the decrease or strike.
>
> The explanation of strikes, employees must give 10 days notice. Then the union strikes. Employees can be permanently replaced. (GC Exh. 5).

[15] GC Exh. 6.

[16] C.P. Exh. 4, p. 2, 3d col.

[17] R. Br. 72.

[18] Ibid.

form requirements for this job, and Randolph routinely wore T-shirts with various logos, such as Mickey Mouse, Disneyland, and football emblems. On occasion, during Company picnics, she wore Cogburn T-shirts stating "We Care." After the advent of the union movement, Randolph wore a prounion T-shirt. Other employees wore procompany shirts.

Randolph was called to Steve Roberts' office on July 12 to discuss an incident pertaining to another employee. Roberts told her that she was not supposed to wear the shirt, and Randolph denied that there was any such rule. Roberts inquired whether she asked for permission to wear the shirt. When Randolph rejoined that other employees wore procompany shirts, Roberts contended that they had asked for permission. Randolph denied this, and asserted that the other employees had been harassed or forced to wear the procompany T-shirts.

Roberts testified on this subject, and agreed that he initiated a discussion about T-shirts with Randolph and told her that she had not asked for permission, unlike the other employees.

2. Factual and legal conclusions

I credit Randolph's testimony, partially corroborated by Roberts, and find that Roberts informed her that she could not wear a prounion T-shirt without obtaining permission. There was no such rule at that time.

Respondent argues that Respondent did not discipline Randolph or discriminate against her in any way.[19] This is irrelevant. The complaint does not allege that Roberts' action constituted a violation of Section 8(a)(3), but, rather, that Respondent imposed a rule, which interfered with employee rights under Section 7.

The Supreme Court has recognized that a hospital (or other health care institution) "may be justified in imposing somewhat more stringent prohibitions than are generally permitted with respect to union activity on the hospital's premises. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 495 (1978). The reason is the need to "accommodate the special needs of patients for a tranquil environment." *Eastern Maine Medical Center v. NLRB*, 658 F.2d 1, 4 (1st Cir. 1981). Absent such need, the Board and the courts uniformly hold that union activity such as the display of Union insignia is protected, and that a rule prohibiting it violates Section 8(a)(1). *Asociacion Hospital Del Maestro, Inc. v. NLRB*, 842 F.2d 575 (1st Cir. 1988), enfg. 283 NLRB 419 (1987); *Hickory Creek Nursing Home*, 295 NLRB 1144 (1989); *Family Nursing Home*, 295 NLRB 923 (1989).

Respondent herein has not even asserted, much less proved, that a need exists which would warrant any restriction on the wearing of union T-shirts. I conclude that Respondent violated Section 8(a)(1) by informing Marilyn Randolph that she could not wear a prounion T-shirt without first obtaining permission.

H. Respondent's Offer of Wage Increases and Benefits in Return for the Union's Agreement not to File Unfair Labor Charges or Objections, and Agreement from the Board not to Accept or Act on Same

On July 1, a few weeks before the election, administrator Hughes wrote Union Official Jerkovich a letter offering to grant wage increases and benefits prior to the election, on condition that the Union did the following:

> Obtain from the President of the International Union assurances in writing that your union or any union will not file any unfair labor practice charges or objections to the election because of anything I might say or give during this period.
>
> Obtain waivers in writing from the National Labor Relations Board that they will not accept or act upon any unfair labor practice charges or objections to the election filed by any party because of anything that might be said or given during the voting period.[20]

In a case where the employer conditioned reinstatement of an employee upon his withdrawal of charges and forbearance from filing future charges, the Board agreed with the judge's statement that "future rights of employees as well as the rights of the public may not be traded away in this manner." *Mandel Security Bureau*, 202 NLRB 117, 119 (1973). The Board's position has been further described as follows:

> While parties to contract and employment-related disputes should be allowed latitude in proposing and reaching mutually satisfactory settlements with respect to such disputes, this latitude is not without limits. Specifically, the Board has a statutory duty not to sanction coercion and interference with basic statutory rights. It is established Board policy, for example, to prohibit an employer from conditioning any benefit on an individual's agreement either not to file or to withdraw unfair labor practices charges with the Board.[21]

However in a case where the employer's offer of benefits (a reduction in discipline) was conditioned on the employee's agreement not to grieve the suspension, "i.e., not to overturn the settlement of that one dispute," the Board found no violation, since the condition did not involve the withdrawal of any charges nor a promise to refrain from filing such charges or engaging in protected activity in the future. *Postal Service*, 234 NLRB 820, 821 (1978).[22]

In the case at bar, there is no indication that Respondent's offer was intended to settle a particular dispute. Hughes wanted the right to say or give anything in the future without any remedy available to the Union. This amounted to a demand for carte blanche to commit unfair labor practices. Hughes' demand that the Board refuse to accept or act upon any unfair labor practice charges or objections to the election is ludicrous. I conclude that Hughes' letter violated Section 8(a)(1).

[19] R. Br. 66.

[20] GC Exh. 39.

[21] *American Postal Workers*, 240 NLRB 409, 412, Member Jenkins, dissenting (1979). See also *General Motors Corp.*, 232 NLRB 335 (1977).

[22] See also *First National Supermarkets*, 302 NLRB 727 (1991); *Phillips Pipe Line Co.*, 302 NLRB 732 (1991).

III. THE ALLEGED DISCRIMINATION

A. Applicable Principles

The General Counsel has the burden of establishing a prima facie case that is sufficient to support an inference that protected conduct was a motivating factor in an employer's decision to discipline an employee. Once this is established, the burden shifts to the Respondent to demonstrate that the discipline would have been administered even in the absence of the protected conduct. The General counsel must supply persuasive evidence that the employer acted because of antiunion animus.[23]

B. The Two Discharges of Toni Michelle Hill

1. The first discharge

a. Hill's employment and union activity

Hill was employed on February 5 as a certified nursing assistant (CNA) on the 11 p.m. to 7 a.m. shift. She signed a union authorization card, was a member of the Union's organizing committee, and spoke to employees about the Union. She was terminated on May 2.[24] A few days before that time, she distributed handbills on the street in front of Respondent's facility. Also, on May 2, she attended one of the mandatory mock bargaining sessions conducted by Supervisor Prentice Smith.

Hill described Smith's method of conducting the session, i.e., one employee was selected to represent the Company, and one the Union. Smith instructed each employee what to say. When the mock union representative asked for higher wages, the purported company representative agreed–at this point Smith corrected her and told her to say that the Company had no money.

Hill was sitting near the table, reading a manual provided by the Union. She moved to the table, and said that Smith was not bargaining in good faith. He became "upset" and "irritated," with his face "red." Banging the table, he stated, "We don't have any money." Other employees joined in the protest, and said that the Company could find money. Smith became irritated with all of them, and said that all the Company had to do was come to the table, and that bargaining could last for years. Smith never finished his program. The employees became quiet, and were thereafter released to return to duty.

b. Hill's discharge

Hill was not scheduled to work the next day. However, Assistant Director of Nursing Janet Brown called her and told her to come in and speak with Registered Nurse Supervisor McGaskle. The latter handed Hill a termination slip signed by Janet Brown, and said that the Company would have to let her go because "things were not working out." The termination slip refers to "several reprimands", and states that there was no "workable relationship" with Hill.[25]

As indicated, Hill was employed on February 5, and was assigned to the 11 p.m. shift. The first reprimand was issued on February 22, when Hill was still in her orientation period. At about midnight, she was transferred to another hall, where the registered nurse was Renee Conko. The latter gave Hill a 30-minute orientation, after which Hill started her regular duties. Because of the delay, Hill was behind in her work, and, as the end of the shift approached, she had not completed her "charting" of the patients, and filling the water pitchers. She approached RN Conko, informed her of this fact, and asked whether the CNA on the next shift could fill the water pitchers. According to Hill's unrebutted testimony, Conko said, "Shit," and stated that she tired of CNA's not doing their duty. As Hill was leaving, she said to herself, "Isn't this shit." Hill testified credibly that she did fill up the water pitchers after receiving a reprimand, although she had to do so after her shift ended. The reprimand stated that Hill's offense was *saying* that she did not have time to fill the water pitchers, and for foul language.[26] CNA April Ford testified that water pitchers are frequently not filled before the end of a shift, and that she had never known a CNA to be reprimanded for failure to fill water pitchers.

The second reprimand is dated March 3, and alleges that Hill called in at 10:20 p.m. to give notice that she would not be present for her 11 p.m. shift, instead of giving the assertedly required 2-hour notice.[27] Hill's daughter had an asthma attack, and she called from an emergency room.

The third reprimand, dated March 26, was for failure to punch in and out for a lunchbreak.[28]

Assistant Nursing Director Brown reviewed Hill's file and decided to terminate her. Brown could not recall the reprimand issued to Hill for failure to call in on time before a shift. She stated that she was present when RN Conko gave Hill a reprimand, and asserted that Hill refused to accept Conko's reason for it, but agreed that she did not observe the exchange between Conko and Hill which led to the reprimand. With respect to the warning for failure to punch out for a lunch period, Brown was asked whether this was a serious offense, but declined to answer. She agreed that she had issued warnings to other employees for the same offense, and that none had been discharged. Brown was asked a series of questions about Hill's abilities in various aspects of her job, and had no criticism except that Hill's "attitude was not good." Although "bad attitude" is a violation of Cogburn policy, Brown never wrote a reprimand to Hill for this alleged deficiency.

c. Comparative treatment of other employees

Felicia Johnson was hired on November 20, 1995,[29] and, accordingly, her 90-day probationary period ended on February 19. On February 12, Johnson called in at 3 p.m. to say she would not be available for her shift beginning at that time. The reprimand states that the required call-in time was one and one-half hours before shift time.[30]

[23] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Manno Electric*, 321 NLRB 278 fn. 12 (1996).

[24] GC Exh. 50

[25] GC Exh. 50.

[26] GC Exh. 47.

[27] GC Exh. 49.

[28] GC Exh. 46.

[29] R. Exh. 35, P.5.

[30] R. Exh. 52. Note that Toni Hill was reprimanded for failing to call in 2 hours before shift time. Supra, fn. 25.

On February 16, still within Johnson's probationary period, she was reprimanded for leaving three patients soiled. The reprimand states that repetition of this offense would result in suspension or termination. Johnson refused to sign the reprimand, giving various reasons.[31]

Despite Johnson's refusal to sign the reprimand, and the fact that the offense took place near the end of her probationary period, Brown asserted that Johnson was not terminated because she told supervisors she would try to do better.

On May 25, Tanya Knox received a reprimand for being wrapped in a blanket in the dayroom with her eyes closed, and for being asked repeatedly to remove soiled linens from a room.[32] On May 29, she was reprimanded for failure to call in before being absent.[33] On May 9, her ice pitchers were not filled, and a bathroom contained human waste.[34] On June 20, she was a no-call no-show and received a reprimand stating that she would be terminated if this happened again. Knox did not call or show up again, and was listed on June 22 as having "quit."[35]

d. Legal conclusions

Respondent's animus against the union movement is established by its numerous violations of Section 8(a)(1) described in the preceding section of this decision. Hill engaged in the activities in which the other union proponents participated and, in addition, emerged as a leader of the union movement on May 2, when she opposed and angered Prentice Smith in his conduct of the mock bargaining session.

Respondent argues that Assistant Director of Nursing Janet Brown had no knowledge of Hill's union activities.[36] This argument is fatuous in light of Respondent's determined effort to obtain knowledge of the union sympathies of its employees. Former Supervisor Carol Purvis identified Janet Brown as one of the management participants in the first meeting with consultant Jay Cole, and in later meetings. In light of this coordinated effort, it is unbelievable that Supervisor Brown would not have heard about Hill's actions in Prentice Smith's mock bargaining session. I do not credit Brown's testimony that she did not speak with any other individual about Hill, as she was an evasive and unreliable witness. Brown's knowledge may also be inferred from the timing of Hill's discharge, immediately after she began handbilling, and after the mock bargaining session. In opposition to an inference based on timing. Respondent argues that the end of a probationary period—in this case Hill's—is the appropriate time to review an employee's file.[37] Yet Brown herself testified that she had terminated probationary employees prior to the end of their probationary periods.

Finally, supervisor Prentice Smith obviously had knowledge of Hill's actions, and his knowledge is attributable to Respondent.

This evidence is augmented by Hill's good work record, admitted by Brown, and by Respondent's disparate treatment of other employees who committed offenses. Hill's transgressions were minor compared to Felicia Johnson's leaving three patients soiled, and Tanya Knox's many offenses, one of which can accurately be characterized as sleeping on the job. Although Respondent contends that Knox was discharged, its records state that she quit. Respondent's failure to discharge these employees, while discharging Hill for lesser offenses, constitutes additional evidence of its discriminatory motivation. *Athens Disposal Co.*, 315 NLRB 87 fn. 1 (1994).

Accordingly, the General Counsel has established a prima facie case that protected conduct was a factor in Respondent's decision to discharge Hill. Respondent has not established that it would have discharged her even in the absence of the protected conduct. Indeed, its lenient treatment of other employees committing graver offenses shows that it would not have done so. Since Respondent has thus failed to rebut the General Counsel's prima facie case, I conclude that it violated Section 8(a)(3) by discharging Hill on May 2 for discriminatory reasons.

2. The second discharge

Medforce is an employment agency that staffs personnel for medical institutions, doctors' offices, and for private duty. Respondent's director of nursing at its Midtown location, Joanne Adams, requests Brenda Rucker at Medforce to send the desired categories and number of personnel. Medforce discusses Respondent's request with its personnel, and asks if any would like to work there. Medforce discusses disciplinary matters with Respondent. If the latter does not want a particular employee, Medforce does not send the employee back to the facility. Respondent's supervisors supervise the work of the Medforce employees, and Medforce does not give them any instructions about their duties. I conclude that Medforce is an agent of Respondent. *Eldeco, Inc.*, 321 NLRB 857, 863 (1996), enfd. as modified 132 F.3d 1007 (4th Cir. 1997)

On August 3, Hill filed an application with Medforce. In listing her prior employers, she did not mention Cogburn. The latter sent in a request for staffing at its Midtown facility, and Brenda Rucker sent her out there. Hill testified without contradiction that one of the nurses told her that she was the best agent that Medforce had ever sent to the facility.

At about the end of 2 weeks at Midtown, Hill ran into Prentice Smith. They recognized each other. Shortly thereafter Brenda Rucker received a call from Joanne Adams at Midtown wanting to know whether "Toni" and "Michelle" Hill were the same person. Adams said that a supervisor, probably Prentice Smith, had asked the question. Rucker replied that it was the same person. The following week, Adams instructed Rucker not to return Hill to the facility, because she had been a former employee of Cogburn. Rucker complied, and assigned Hill to other jobs, which she performed without incident.

Prentice Smith contended that he received a telephone call at night from one of the Midtown nurses, asserting that a Toni Hill had been involved in an "incident' with one of the patients. Smith could not remember the name of the nurse. He did not recall the details of the alleged incident, and did not conduct

[31] Ibid.
[32] GC Exh. 51.
[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] R. Br. 58.
[37] Ibid.

any investigation. Hill testified that she was asked about a patient who had bruised her arm at the Tuscaloosa Street facility. She did not know the identity of the patient, was not required to fill out any report, and was not reprimanded. I conclude that the testimony of Brenda Rucker and Toni Hill is more reliable than that of Prentice Smith.

I find, as Rucker and Hill testified, that Respondent instructed Medforce not to send Hill back to Midtown because she had previously been an employee of the Company. She was no longer an employee because Respondent had unlawfully discharged her. Hill's failure to list Respondent as a prior employer on her Medforce application is irrelevant. This was not the reason Respondent instructed Medforce not to send her back. Since Hill would have continued to be employed at Tuscaloosa Street but for her unlawful discharge, Respondent cannot justify its instruction to Medforce on the basis that she had been a former employee. I conclude that Respondent instructed Medforce to stop sending Hill to Midtown for the same discriminatory reasons which caused it to discharge her from Tuscaloosa Street, and that Respondent again violated Section 8(a)(3) of the Act.

C. The discharge of Carla Wiggins

1. The evidence

Carla Wiggins was hired as a dietary aide in March 1995. On May 16, she and most of the other dietary aides started wearing a union button, which said, "Fight for Dignity." I have previously found that Owner and Vice President Steve Roberts and director of admissions Ann Bell unlawfully interrogated her on that day concerning what the button said. This incident led to Wiggins' discharge the same day.

Wiggins credibly testified that, in response to Bell's inquiry as to what the button said, Wiggins replied, "Fight for Dignity." Steve Roberts testified that Bell came to him and reported that Wiggins was "quiet and withdrawn," and was wearing a button. Roberts contended that Bell told him she asked Wiggins what the button said, and that Wiggins did not reply. I credit Wiggins' testimony that she did reply.

Roberts then went to the dining room. His object, he testified, was to "observe Wiggins' behavior." He was informed that she was normally a jovial person, and he wanted to find out "what was wrong" with Wiggins.

Roberts asserted that he first observed Wiggins from a distance of 18–20 feet, and then walked behind the serving line and observed her from a distance of 7–8 feet. Wiggins testified that she was her "normal self" that day. Her testimony reads:

> I was serving. I was bending down to get a plate. I was serving someone at that time. And he came from behind me. I didn't see him come. He came from behind me. He scared me. I didn't really see him . . . He came up behind me from nowhere.

Roberts asked her what the button said. Wiggins testified on cross-examination, that she said, "Fight for Dignity," and held up the button and showed it to Roberts. He then asked whether she felt that she was not being treated with dignity. "I didn't say that," Wiggins replied. Roberts asked the same question again, and received the same answer.

Roberts agreed that the first thing he said was, "What does your button say?" Wiggins was serving a box lunch, and did not answer. He asked again, and she still did not answer. She then said to him, "It says 'Fight for Dignity.'" Roberts then asked, "Don't we treat you with dignity" and left. He denied knowing that Wiggins' button was a Union button.

Alma Hayward and Shenece McCollum corroborated Wiggins. She was not talking loud. According to Hayward, Wiggins looked "scared" when Roberts was talking to her. He was "close enough to touch her."

Roberts then told Dietary Manager Sonya O'Shea about the incident. He told O'Shea that Wiggins had a bad attitude; he asserted concern that she might treat the residents the way she had treated him. Roberts agreed that neither he, Sonya O'Shea, nor Ann Bell had received any complaints about Wiggins from residents. He agreed that he did not conduct any investigation of Wiggins' "bad attitude."

Respondent has a progressive disciplinary system starting with a warning and ending with termination. The seriousness of the offense and the employee's past history are to be taken into account. The policy procedure manual lists 17 offenses warranting immediate dismissal. One of these is "refusal to carry out orders . . . insubordination."[38] Roberts contended that Wiggins had been insubordinate.

O'Shea had just come back from 2 weeks of medical leave. She testified about an incident involving Wiggins and Assistant Dietary Manager Virginia Mitchell about 2 weeks before the one on May 16 involving Wiggins and Roberts. Mitchell reported to O'Shea that there had been a meeting of employees in the dining room. When they came out, Mitchell asked Wiggins, "What's going on?" Wiggins replied that she was not going to tell her, because Mitchell "tells everybody's business." Mitchell protested to O'Shea that Wiggins had been "rude," and O'Shea asked Wiggins for an explanation. "What's wrong with you?" she asked. Wiggins assertedly replied that she was "sick and tired of the Union." O'Shea asked Wiggins whether anybody was "pressuring her," and Wiggins denied it. Mitchell wrote up Wiggins for this incident.

O'Shea described the relationship between Wiggins and Ann Bell as one of jovial joking, usually about the good clothes Bell was wearing. However, Wiggins did not engage in this type of conversation with Bell on May 16.

After Roberts reported the incident with Wiggins on May 16, O'Shea decided to terminate Wiggins before talking with her, although she described Wiggins as one of her best employees. O'Shea testified that she made this decision because of Wiggins' "attitude."

O'Shea testified that if an employee wasn't smiling, was depressed, or in a bad mood, that this would "be a pretty minor violation of Company policy." Asked whether an employee's refusal to discuss a problem was "rude," O'Shea said that it would depend upon the situation. She defined "bad attitude" as not maintaining a pleasant attitude for residents, talking loud, disruption, or ignoring staff members. O'Shea agreed that, under this policy, she could issue a disciplinary notice to every

[38] GC Exh. 3.

employee. She has not "written up" everybody who has had a "bad attitude."

After her conversation with Roberts, O'Shea called Wiggins to her office and terminated her, within 20 minutes of the time Roberts had his conversation with Wiggins. The termination notice reads:

> Ms. Wiggins is being terminated due to her conduct towards other staff members. Our policy states that you are to speak and act all time in such a manner to bring credit and respect to yourself your department and the health center. Wiggins has been reported by staff members as not having a pleasant attitude ignoring them as they come thru the serving line and speaking to her. Mr. Steve Roberts asked her a question and she did not answer him until he confronted her. This type of attitude will not be tolerated.[39]

2. Factual and legal conclusions

Respondent's animus against the Union has already been established. Most of the dietary aides started wearing union buttons on May 16. Prior to Roberts' conversation with Wiggins, Ann Bell had already asked her what the button said, and had received the reply "Fight for Dignity." Roberts' denial that he knew Wiggins' button was a union button is inconsistent with Respondent's assiduous collection of information on the union sympathies of its employees, the fact that Wiggins had already answered Ann Bell's question about the button, and the peremptory nature of Roberts' inquiry. He did not first ask Wiggins what was "wrong" with her—his asserted reason for the interrogation. Rather, his first question was, "What does your button say?" In light of these facts, I do not credit Roberts' denial that he knew the button was a union button, and conclude that he did know this .

I credit Wiggins' corroborated testimony that Roberts came up behind her "from nowhere", and that she did not see him, at least initially. Nonetheless, she did answer his question, twice verbally and once by holding up the button for Roberts' examination.

I further conclude that Wiggins' had no obligation to answer Roberts, because his question was unlawful. This eliminates at the outset Respondent's asserted reason for discharging Wiggins.

Other inconsistencies and contradictions in Respondent's evidence support this conclusion. Although Roberts claimed that Wiggins had been insubordinate, the termination notice does not even allege this reason, for which there is no foundation. Wiggins' conduct did not meet any of the criteria for "bad attitude" described by O'Shea. Thus, Wiggins was not loud or disruptive, and did not ignore staff members. Although O'Shea did not reprimand everyone who demonstrated a "bad attitude," she proceeded immediately to the drastic discipline of discharge in the case of Wiggins—one of her best employees. Assistant dietary manager Mitchell asked Wiggins what was "going on" in a meeting of employees. Wiggins refused to answer and refused to complain to O'Shea that she had been "pressured" to join the Union. She was then given a reprimand for her "bad attitude," i.e., refusing to cooperate with the Company's surveillance of its employees.

Respondent thus gave no reason to Wiggins for her discharge except her attitude. However, where an employer gives only an employee's "attitude" as the reason for his discharge, and fails to inform him as to any other reason, the Board has long held that an inference may be drawn that the real reason is not among those asserted. *Resolute Realty Management*, 297 NLRB 679, 687 (1989). The timing of Wiggins' discharge—immediately after she started wearing a union button constitutes evidence of discrimination. The fact that O'Shea decided to discharge Wiggins before obtaining her version of the events further establishes Respondent's discriminatory motivation under established Board law. I conclude that Respondent discharged Wiggins on May 16, because of her union sympathies, in violation of Section 8(a)(3) and (1) of the Act.

D. The Discharge of Ethel Husband

1. The evidence

Ethel Husband was hired in April 1995, and worked until May 16, 1996, at which time she was discharged about 30 minutes after Carla Wiggins.

Husband was a cook on the morning shift, from 5 a.m. until 2 p.m. She opened the kitchen, and cooked breakfast and then lunch. After preparing the food, Husband placed it on a warmer table near the serving line. The warmer table had controls, which adjusted the temperature, a function performed by the employee on the serving line.

About 4 or 5 months after she began working, i.e., in about in August or September 1995, Sonya O'Shea told her that some red beans had been scorched. Husband replied that they were not scorched when she put them out, and that it was possible that the employees on the serving line had turned up the warmer too high. Other than that, Husband received no criticism about her cooking. Neither O'Shea, Mitchell, nor administrator Hughes issued any reprimands. On occasion, O'Shea complimented Husband about her cooking.

On the morning of May 16, Husband put on a union button, as did Wiggins and most of the other dietary aides. After putting on the button, Husband went to the restroom. On the way, a head nurse asked her what the button said, but Husband did not reply.

At about 1 p.m., Husband was called to O'Shea's office. The latter told her that she had received a lot of complaints from the administrative staff, and that some residents said that some the food was too salty. O'Shea mentioned lima beans, to which Husband replied that she knew about the red beans, but not lima beans. Husband stated that the kitchen had been out of salt for a period of time when O'Shea was absent on sick leave. O'Shea then discharged Husband.

O'Shea contended that Husband had failed to prepare food properly in that she had not taken it out of the freezer in advance, and had failed to cook roast beef and chicken sufficiently. O'Shea asserted that she gave Husband verbal counseling for these offenses, but no written reprimands. She did not keep any written record of the verbal counseling. O'Shea agreed that Respondent's policy and procedure manual applies to cooks. This manual reads in relevant part:

[39] GC Exh. 54.

PROCEDURE

VERBAL WARNINGS—Documentation including date, time, infraction, summary of conversation should be made. Notes of the counseling session should be forwarded to the Department Head marked "Verbal Warning" for the employee's personal file.[40]

The procedure manual is dated January 1995.[41] O'Shea, however, asserted that the requirement of putting verbal warnings into writing was not implemented until September 1996.

O'Shea described the deficiencies of other cooks. Thus, Cora Bailey burned or overcooked food two or three times—roast beef, bacon, cornbread, and lima beans. She failed to remove food from the freezer in time for cooking. O'Shea gave Bailey a verbal warning in December 1996, a written warning in March 1997, and another verbal warning on the Friday before the hearing in this matter. She was not discharged.

Virginia Mitchell was in charge of the kitchen during the 2 weeks that O'Shea was absent on sick leave. She contended that Suzanne Hughes and about three residents complained that the okra was burned, and that the food was too salty or too bland. Mitchell did not recall that she spoke to Ethel Husband about these complaints and was not sure that she talked to O'Shea about them before Husband was fired.

2. Factual and legal conclusions

The procedure manual is dated January 1995, and there is no evidence other than O'Shea's testimony that it was not effective when dated. I rely on the documentary evidence, and do not credit O'Shea's contention that the recording of verbal warnings did not begin until September 1996. Accordingly, I conclude that this policy was in effect throughout the entirety of Husband's employment, which began in April 1995. Since Respondent did not produce any such documentation, and because Husband was a credible witness, I accept her testimony that she did not receive any reprimands, and that the only criticism she received was O'Shea's comment about scorched red beans, to which Husband respondent appropriately.

Husband's credited testimony includes her averment that she received no reprimand from Virginia Mitchell. Further, there is no evidence from Mitchell that she even spoke to O'Shea about Husband's alleged deficiencies during O'Shea's 2-week absence. For these reasons I discount Mitchell' testimony as providing any justification for Mitchell's discharge.

As in the case of Wiggins, the timing of the discharge, immediately after Husband started wearing the union button, constitutes evidence of discriminatory motivation. The credited evidence shows that Husband was a satisfactory employee who had been praised by O'Shea. Cora Bailey, on the other hand, had an unsatisfactory record, yet was still employed by Respondent at the time of the hearing. This disparate treatment constitutes further evidence of an unlawful reason for Husband's termination. I conclude that she was discharged on May 16 because of her union sympathies manifested by her wearing of the union button, in violation of Section 8(a)(3) and (1).

[40] GC Exh. 3.
[41] Ibid.

D. The Discharge of Carl Langham

1. The evidence

Carl Langham worked in the dietary department from February 1976 until May 17, 1996. He was a union supporter and wore union paraphernalia. I have found that O'Shea unlawfully interrogated him in April, at which time he informed her that he was "100% for the Union."

On the morning of May 9, Langham was working a second job. His normal starting time at Respondent's facility was 10:30 a.m. Before that time, O'Shea called his house and told his mother to have him call the facility. His mother replied that he was not in, and O'Shea replied, "That's okay," according to O'Shea's testimony. Langham arrived home at 9:30 a.m. and received the message that Cogburn had called. Langham left immediately for the facility, wearing the shorts in which he had been working. His house was 10 to 12 minutes from the facility.

According to Langham, he arrived at the facility at 9:50 a.m. Mitchell was working on the line, and told him that she was two employees short and needed him to come to work immediately. He replied that he would have to go back and change clothes. Mitchell agreed, and told him to hurry back. Langham did so, returned to the facility, and clocked in at 10:28 a.m., 2 minutes before his starting time. This fact is established beyond any doubt by Respondent's timekeeping records.[42]

Roberts and Mitchell gave testimony inconsistent with this documentary evidence. Thus, Roberts testified that he saw Langham clock in when he first arrived, wearing shorts. Mitchell denied that Langham came in early. She asserted that he came in at his "regular time." Mitchell omitted any explanation for her early call to Langham's house. Her alleged first words to Langham were, "Carl, you're not in uniform," even though she agreed that Langham did not have a uniform. Mitchell told Langham to go home and change, and asserts that she next saw him at 10:50 a.m. She asked him to come to her office and contended that he then admitted that he had clocked in while not in uniform, and left to change into his uniform without clocking out. Mitchell gave him a reprimand for clocking in and then leaving the facility to change clothes.[43]

Langham testified that he denied to Mitchell that he had clocked in and then left the premises; he affirmed that he refused to sign the reprimand. There is no signature on the document.[44]

That Langham clocked in at 10:28 a.m. is indisputable. It is highly unlikely that he could have encountered Mitchell at that time, received her instruction to go back home and change into uniform, have done so, and have been back 22 minutes later at 10:50 a.m.—the time Mitchell contended she saw him a second time. On this version, Langham would have made a round trip of 20 to 24 minutes in 22 minutes, would have talked with Mitchell, and would have changed clothes in his residence. On Langham's version, that he arrived at 9:50 a.m. (and clocked in at 10:28 a.m.) there would have been 38 minutes for these

[42] GC Exh 53.
[43] GC Exh. 28.
[44] Ibid.

events, a more likely sequence than Mitchell's impossible scenario.

Finally, Mitchell's testimony that Langham admitted that he clocked in and then left without clocking out is unbelievable. I credit Langham's testimony that he denied this to Mitchell, and refused to sign the reprimand because the allegation was untrue. Langham was a truthful witness, and his testimony that he denied the allegation is supported by the unsigned reprimand and the impossibility of the version asserted by Mitchell.

On May 16, Langham started wearing a union button, together with the dietary aides. On the morning of May 17, O'Shea told Langham that she was ordering a uniform for him, since his probationary period was ending, and asked him what size he wore. O'Shea admitted seeing Langham wearing the union button, as did Mitchell. Later that day at lunchtime, O'Shea and Steve Roberts discussed Langham. O'Shea told Roberts that she was "really surprised" that Roberts had not discharged Langham on May 9 (when O'Shea was absent) because "he left on Cogburn time . . . You're getting soft," O'Shea told Roberts. The latter replied that he did not know that Langham had left the facility, and would have discussed the matter with Mitchell if he had known this. However, O'Shea testified that Mitchell told her Roberts had been informed of this alleged fact.

After O'Shea's conversation with Roberts on May 17, she called him into her office, presented him with the same reprimand Mitchell had given him on May 9, and asked him to sign it. Langham again refused, for the same reason. O'Shea then discharged him. She told him that, if it were left up to her, she would have suspended him, because he was a good worker.

2. Legal conclusion

Respondent's animus has already been established. Langham's union sympathies were known, and he had been unlawfully interrogated. On May 17, the stale and unjustifiable reprimand of May 9 was dredged up as a pretext for Langham's discharge. Whether the discharge was precipitated by Langham's donning the union button, or by O'Shea's criticism of Roberts for his failure to discharge Langham during O'Shea's absence, is irrelevant. Langham was discharged because of his union sympathies, in violation of Section 8(a)(3) and (1).

D. The Discharge of Elaine Collins

1. Collins' employment history and the transfer from the hall to the dining area

Collins was an employee of Cogburn for almost 20 years. During the early period of her employment she was a "direct care" CNA. She worked "on the hall," and was required to turn and dress patients, and attend to their hygiene. According to Nursing Director Joan Branning, work as a CNA on the hall included bathing and weighing a patient. Weighing a patient necessitates getting the patient out of the bed onto a scale. According to Branning, "You have to lean over and bend and twist and stoop and all kinds of contortions to get these residents off the side of the bed onto the scale." Cogburn's policy was that two CNA's were supposed to do this as a team. However, Branning agreed that CNA's occasionally attempted to do this alone because of a shortage of CNA's and that some had sustained back injuries as a result of attempting to lift a patient. Elaine Collins testified to similar effect—CNA's had to learn "body mechanics," and frequently had to lift patients alone.

Collins testified credibly that she suffered two back injuries, and, in 1994, became unable to engage in this work. A position became available as a CNA in the dining area. Collins asked for and received it. This job involved serving patients, handing out snacks, and assisting patients in eating. She was not required to dress or bathe patients. Although Collins had to weigh patients monthly, during the first days of each month, this was done with colleagues, and she did not do it as often as she did when on the hall. Collins' principal function was to calculate and chart the weight of the patients.

Collins was cross-examined extensively on her testimony that work in the dietary area was easier than work on the hall. Thus, counsel pointed to the job description for a dietary assistant, which Collins signed in 1993, and which specifies that such employee must be "able to turn, bend, stoop, stretch and lift in assisting patients as required without restraint."[45]

Collins answered with the following explanation:

> Stooping and bending and stretching in the capacity I was working (in the dietary area) was totally different from when I was working on the hall. . . . When patients come to the dining room, they're in wheelchairs; you roll them up to the table. When you're on the hall, you are doing total care for that patient. You're pulling that patient back and forth in the bed. When we are weighing a patient (a dietary area duty) a lot of patients can get on the scale by themselves. I wasn't doing a lot of bending over, pulling on the patient. . . . I did a lot more when I was working on the hall than I was doing in the capacity I been in the past two years.

Shenece McCollum was a CNA who first worked on the hall, but who was transferred to the dining area on May 1. McCollum gave testimony on the difference between the two jobs. Thus, getting a patient out of bed as a CNA on the hall involves standing on the edge of the bed, reaching across the patient to the shoulder and hip, and pulling the patient over—taking care that the patient does not roll out of bed.

The feeding of patients in the dining room involves wheeling them in a wheelchair to the table. They normally do not leave the wheelchair .

McCollum next described the weighing process, which takes place when the dietary aides are not in the dining room. If a patient is in a wheelchair, the CNAs lift him up, "pivot" him, and seat him on the scale. If a patient is bedridden, the CNAs must roll the patient over to get him onto a scale. McCollum agreed that this was the same type of maneuver as that used when washing a patient, but two CNA's would do it. McCollum testified that there were "off days" when there would be only one dietary CNA to do the weighing. However, this was from 8:40 until 10 a.m., at which time another CNA would arrive and remain for the afternoon weighing. If a single CNA encountered a very heavy patient between 8:40 and 10 a.m., she would never attempt to weigh the patient herself, but

[45] R. Exh. 15.

would ask for assistance from one of the CNAs working on the hall.

Elaine Collins named several employees who worked on "light duty" as dietary aides because of various physical conditions.[46] Some of these were pregnancies, and one was a "twisted wrist."

Administrator Suzanne Hughes testified that Collins received an evaluation in 1986 in which she was described as "inspiring to others" in dealing with people. In 1988 she was rated as "excellent" overall, although only "fair" in dealing with people. However, this went back up in later evaluations in the record for 1993 and 1994. On both of these reports Collins received a score of "excellent" in all 13 categories, and, in the 1993 evaluation, received the highest possible score in all categories. Included in these categories was "attitude," in which she demonstrated a "keen interest in job and effort of nursing home," and "dealing with people," in which Collins was "inspiring to others in being courteous."[47]

Company Vice President Steve Roberts said that Collins was "nice while she was there," and Administrator Hughes testified that she was a "good employee."

Collins' fellow employees concurred with these opinions. Shenece McCollum worked with Collins in the dining area, and described her as a "good worker." Several of the patients requested her as their server, and she got along with other employees fairly well. In the weeks just before Collins left Cogburn, she was always a nice person to McCollum and to everyone else. Carla Wiggins and Carl Langham gave similarly favorable reports.

2. Collins' union activities and discharge

Collins was one of the early supporters of the Union. She signed an authorization card, spoke to employees, was a member of the organizing committee and wore the "Fight for Dignity" union button. Collins testified at the representation hearing in this case on May 7 or 8. Management officials present at this hearing were Suzanne Hughes, Janet Brown, and Janet Doughdrill. Ten days later, on May 17, Collins was discharged – Respondent's fourth discharge on May 16 and 17.

Administrator Suzanne Hughes testified that she had been discussing a transfer of Collins with nursing director Branning for at least a month prior to May 16. Branning, however, denied that she discussed the matter with Hughes. Instead, Shenece McCollum was transferred from the hall to the dining area on May 1. After Collins was temporarily ordered to be transferred back to the hall on May 7, "her spot in the dining room had to be filled," according to Branning. Accordingly, Patricia Blackman was transferred from the hall to the dining area. Two employees thus went from the hall area, while Collins was to be sent back to the hall.

Collins was called to a meeting with nursing director Joan Branning and assistant nursing director Janet Brown on May 16. Branning said that they were having "problems" in the dining area, which she did not identify. Also, they were starting a new "buddy system," and Collins would have to return to the hall. Branning said that they were "short" on the hall, which Collins interpreted as meaning short of CNA's.

Collins was "shocked" at this news, and protested that she would have problems again working on the hall, and would have to see her doctor. Branning examined a 1994 physical examination of Collins, and said that she still needed her on the hall.

Collins visited her physician, Dr. M. Preston Daugherty Jr. He had given her an annual physical examination a few days before, on May 13, and concluded that she capable of functioning in the dietary department.[48] Collins told Dr. Daugherty about the transfer, and he stated that she could not do work on the hall. He gave her a letter dated May 16 stating that she had degenerative disc disease of the lumbar spine and chronic lumbosacral strain. "Any bending, lifting, and stooping which would be occasioned by doing hall work will aggravate her condition and she should not be required to perform these tasks."[49]

Collins gave the letter to a supervisor for transmittal to Janet Brown, and called her that night to verify receipt of the letter. Brown told her to come in the next morning, May 17, and temporarily assigned her to the north station feeding table.

Manning consulted with Suzanne Hughes, who read Dr. Daugherty's letter. Hughes testified that, after reading it, she concluded that Collins was physically unable to work as a CNA on the hall. Asked whether she still intended to transfer Collins back to the hall, Hughes merely replied that she and Manning discussed the matter. Asked again, Hughes replied that, "since both job descriptions were basically the same, we didn't know what she could do."

Collins was called back to talk again with Brown and Manning. The latter said: "Well, we don't have anything for you to do." She asserted that Suzanne Hughes had read Dr. Daugherty's letter and had "problems" with it. Collins outlined her duties in the dietary area, and said that she could still perform those functions.

Manning replied, "Well, we don't want you in the dining area." The reason Manning asserted was that Collins did not smile as she formerly did, and had an "attitude problem." Collins responded that the patients were all glad to see her back. She asked whether she could have her vacation. Manning replied, "No . . . We just can't make a job for you."

Hughes testified originally that Collins could do the dietary job satisfactorily. However, upon reading Dr. Daughtery's letter, she concluded that Collins could not perform as a CNA on the hall. She contended that, since lifting, bending, and stooping were part of the job descriptions of the CNA's function in both the dietary area and on the hall, Collins could not perform either work. Dr. Daughtery had said "she could not perform any lifting, bending, or stooping." Hughes neglected to mention that the doctor's statement of this restriction in his May 16 letter was limited to hall work.

On June 24, Respondent published a document, which Steve Roberts read to employees. It stated in part: "The only way any of these released employees would come back is for the

[46] Australia French, Lenore Young, Catherine Fowler, and Diane Davis.
[47] GC Exhs. 36–37.
[48] R. Exh. 16.
[49] R. Exh. 25.

Federal Court Judge to put a gun to our heads."[50] According to Roberts' testimony, this statement referred to one employee in particular—Elaine Collins.

On June 28, Hughes wrote Collins a letter stating:

> You were removed from your assignment as a CNA in the dining room due to your less than pleasant demeanor, which generated complaints from residents, sponsors, and staff members, and reassigned to a CNA position on a nursing unit.

The letter notes that Collins saw another doctor at Hughes' request, and that he confirmed that Collins had a back problem. Hughes' letter continues:

> As you know, the lifting and pulling requirements of a CNA assignment in the dining room, which includes service on the weight team, and an assignment on the hall are substantially the same. Accordingly, we are puzzled by the findings of Dr. Daughtery and Dr. Dyas[51] as you have been performing the duties of a dining room CNA, which included your duties as a member of the weight team, without complaining of any difficulties.

Despite this admission, Hughes stated that there were no positions available for Collins, based on the restrictions stated in the doctors' letters. The letter invites Collins to suggest "reasonable accommodations" as to a position, and, if she failed to do so, Hughes would conclude that she had "chosen to resign her employment."[52]

On August 13, Dr. Daugherty wrote Hughes about her opinions stated to Collins in Hughes' June 28 letter. In it he states that Hughes referred Collins to Dr. Edmund Dyas who said: "We have only made the recommendation that she remain on light duty." Dr. Daugherty continued with a list of specific restrictions for Collins.[53] I conclude below that Collins was discharged on May 17. Accordingly, Hughes' June 28 letter and Dr. Daugherty's August 13 letter were both after the fact.

Respondent presented witnesses who gave hearsay testimony about Collins' attitude and demeanor. Virginia Mitchell testified that residents complained about Collins, but could not remember specific incidents or names. Hughes testified that Branning received reports that Collins was not interacting with residents, and that Steve Roberts told her that his wife observed Collins in the dining room with an "expressionless" demeanor. Steve Roberts did not corroborate this, and his wife did not testify. Branning testified that LPN Regina Smith complained about Collins 3 weeks before the "transfer." Smith's complaint is in evidence, and alleges a change in Collins' attitude and demeanor in the prior 4 weeks. The memo is dated May 7[54]—when the representation hearing at which Collins testified was in progress. Smith did not testify. Branning further asserted that residents had made complaints to O'Shea, but this was not corroborated by O'Shea or any other witness. No written complaint was received from a resident, and Collins was never notified of any problem.

3. Factual and legal conclusions

a. Collins' employment record

Respondent's animus against the union movement has already been documented. Collins, however, was a special case. She was the only employee shown by the record to have testified against Respondent in the representation hearing. This fact, together with her other union activities listed above, brought her sharply to Respondent's attention. Roberts' testimony that he was referring particularly to Collins when he said that Respondent would bring back discharged employees only if a Federal judge held a gun to Respondent's head, reveals the depth and intensity of Respondent's antiunion animus in general, and against Collins in particular.

Collins was an employee of almost 20 years standing, with a glowing record. Her evaluations show an employee of the highest caliber—in one of the evaluations she made a perfect score. The employees who testified about her gave the same opinion as to her work habits and rapport with colleagues and patients. Even Respondent's managers spoke favorably of her—before she testified at the representation hearing.

b. The nature of Collins' two jobs

The factual issue regarding Collins' employment is whether work as a dietary aide was less strenuous than that of a CNA on the hall and thus that Respondent's aborted transfer of Collins back to the hall was to a more onerous job. Respondent cites similar functional requirements in the job descriptions of both positions. On the other hand, Collins and McCollum testified that they were different, and that the dietary aide job was less strenuous. Collins pointed out that patients in the dining area simply wheeled to the table. As for weighing patients many simply get on the scale themselves. Collins frequently engaged only in recording their weight. McCollum agreed that although the maneuvers required to get a patient out of bed to weigh him are the same as those required to wash him, there are two dietary aides to perform this job, except for 8:40 to 10 a.m., when one CNA was off on certain days. During those times, a dietary CNA encountering a heavy patient would get the assistance of another CNA on the hall. This is different from the "total care" of patients described by Collins for a CNA on the hall.

The doctors' reports lead to the same conclusion. Dr. Daugherty's May 13 examination of Collins indicated that she was capable of functioning in the dietary department. After learning of Respondent's intention to transfer her back to the hall, he stated functional limitations, but said that these would prevent her from doing work on the hall. Dr. Dyas, to whom Hughes referred Collins, was quoted by Dr. Daugherty as saying that Collins should "remain on light duty." This is an implicit statement that Collins was still capable of doing work in the dietary department.

The numerous employees with various impairments assigned to the dietary department show that Respondent itself considered this work as less strenuous. Hughes, in her June 28 letter

[50] GC Exh. 7, p. 5.
[51] The doctor to whom Collins was referred by Hughes.
[52] GC Exh. 34.
[53] She should not lift more than 10 pounds, should bend only at the waist with proper body mechanics, should not bend and twist at the same time, should not stoop and pick up objects without proper body mechanics, and should not pull and lift patients. R. Exh. 17.
[54] GC Exh. 42.

to Collins, admitted that she was "puzzled" by the doctors' findings, since Collins had been performing as a dietary aide without complaint. Hughes' "puzzlement" misreads the reports of the doctors, who concluded that Collins was capable of working in the dietary department.

I conclude that Respondent seized on similar functional requirements in two job descriptions and misinterpreted the doctors' reports in order to develop a pretext for discriminating against Collins.

c. Collins' discharge

On May 16, Nursing Director Manning told Collins that she was being transferred back to the hall. When Collins presented a letter from Dr. Daugherty stating Collins' physical limitations, Hughes read the letter and concluded that Collins was physically unable to perform as a CNA on the hall. After evasive testimony as to what she intended to do with Collins, Hughes replied that they did not know what Collins could do.

When Collins talked with Manning again, the latter said, "Well, we don't have anything for you to do." When Collins asked to return to the dietary department, Manning said that Collins had an "attitude problem." When Collins asked whether she could have a vacation, Manning replied, "No . . . we just can't make a job for you." The Board has agreed that statements of this nature from an employer to an employee constitute termination of the employment relationship. *Watts Electric Corp*., 323 NLRB 734, 735 (1997). Although the complaint alleges that Respondent transferred Collins back to more onerous work on the hall. I conclude that Respondent discharged Collins on May 17. Hughes' June 28 letter to Collins asserting that she had "resigned" her position unless she could come up with "reasonable accommodations," was mere window dressing designed to cloud the fact that Respondent had already fired Collins.

d. Respondent's asserted reasons and conclusions

Branning's reason for the original decision to transfer Collins back to the hall was that Respondent was short of CNA's on the hall. However, Shenece McCollum was transferred from the hall to the dining area on May 1, and, after Collins was discharged on May 17, Patricia Blackman was also transferred from the hall to the dining area. I conclude that this reason was pretextual.

Manning's asserted reason for refusing to let Collins return to the dietary area was that she had an "attitude problem." However, in a prior evaluation, Collins received the highest possible score in the attitude category. Her colleagues and even Respondent's managers concurred. Respondent presented hearsay evidence in attempts to contradict the favorable evidence presented by the General Counsel. It has no probative value and I conclude that the "bad attitude" reason for Respondent's refusal to return Collins to the dietary area was pretextual in nature.

Respondent's asserted reason that Collins was incapable of continuing as a dietary aide because of physical limitations is contradicted by the medical record and Collins' proven capacity to engage in this work.

We are left with the very strong prima facie case presented by the General Counsel. Collins' established capacity as an employee, her union activities, the brief period between her testimony at the representation hearing and her discharge, and the intensity of Respondent's animus, warrant a finding that Respondent discharged her because of those activities and her testimony at the representation hearing, in violation of Section 8(a)(1), (3), and (4) of the Act.

G. The discharge of Brenda Kirk

1. Kirk's employment history

Brenda Kirk was hired in October 1995, as a sitter for Mrs. Roberts, the mother of Suzanne Hughes and Steve and Bill Roberts, Respondent's owners. Mrs. Roberts suffered from Parkinson's disease and dementia, and underwent a tracheal insert. Suzanne Hughes interviewed Kirk extensively before assigning her to be the sitter for Mrs. Roberts. Hughes concluded that Kirk was a kind, caring, and stable individual.

Carol Purvis was hired in October 1995, and left Cogburn in June 1997. She was the supervisor of the CNAs, and had responsibility for Mrs. Roberts' care. Purvis testified as follows about Brenda Kirk:

> From a nurse's viewpoint, she was excellent. She gave Mrs. Roberts probably the best care that any sitter had ever given to her. She was very attentive. She was very professional.

Purvis testified that Kirk did not engage in any unusual or improper behavior, that she did not receive any complaints about her, and that Purvis was not asked to conduct any investigation about her.

Laura Cowser, a witness for Respondent, was the staff nurse in charge at the station where Mrs. Roberts' room was located. Mrs. Roberts was one of Cowser's patients, although Kirk was responsible for her basic care. Cowser testified that Kirk gave Mrs. Roberts "great care," and that Cowser never heard any complaints about her.

Kirk suffered a knee injury at the facility, and was told by her doctor that she had to walk frequently as therapy. Hughes agreed to this. Mrs. Roberts' room was small, and there was another patient in the room, together with furniture. Kirk arrived early, and walked in the building before work. At other times, she walked when Mrs. Roberts was asleep, and never left without informing the nurses. Her walks lasted 15 to 20 minutes. She looked in on Mrs. Roberts' room as she passed it.

2. Kirk's union activities and discharge

The status of the sitters in the forthcoming election had been in doubt. On June 29, Kirk received notification that the sitters would be allowed to vote. On July 2, Kirk attended a Company meeting of about 10 employees, which was conducted by RN Cathy Ledbetter. The latter stated that if any employee said she did not know whether she favored the Union, the statement was not true—"You could bet that they were a "Yes' vote." Kirk asked Ledbetter why Respondent was trying to keep the Union out, what the Company was offering, what the employees wanted, and whether the requests were unreasonable. Kirk went to a second campaign meeting the same day, conducted by

Nursing Director Branning and attended by Administrator Hughes and other supervisors. Kirk told everybody that she wanted information before she made a decision about the Union and intended to go to a union meeting.

The next day, July 3, Kathy Ledbetter gave Kirk a handbill explaining why she should not vote for the Union. Branning came into the room, and Kirk asked the supervisors about the handbill.

On July 4, Director of Sitting Services Mamie Parker told Kirk that Administrator Hughes had said Kirk was walking too much. Parker told Kirk to stop walking.

On July 5, Kirk was discussing a union flier with another employee when Hughes came into Mrs. Roberts room, Hughes asked for a copy of the flier, and Kirk gave her one. Kirk asked about Hughes' complaint about her walking, and Hughes told Kirk to stop walking. Kirk thereafter refrained from walking. Hughes corroborated this, and testified that she had asked Parker to tell Kirk to stay in Mrs. Roberts' room.

On July 8, Kirk went to a union meeting and signed an authorization card. On the same day, July 8, Director of Sitting services Parker called Kirk and told her that she was being taken off Mrs. Roberts case because Hughes did not want her on the job any more. Kirk asked for the reason, and was told that she had been heard crying hysterically in a hall, that she had said there were demons in Mrs. Roberts' room, and that she was walking excessively.

The first alleged incident happened about a month before Kirk's termination. She met an applicant for employment in the hallway, and the latter told her that her mother had just died and that she was recently divorced. The applicant cried, and Kirk comforted her. Supervisor Janet Brown claimed that she observed this incident. She wrote a memo stating that, on June 14, she observed Kirk "standing in the hallway with a young lady who had come in for an interview, crying and praying." The memo is undated, and Brown was unable to recall when she wrote it.[55] Brown claimed that she discussed the incident with Kirk's supervisor, Mamie Parker. Kirk testified that she comforted the applicant but denied crying.

The second incident involved a new roommate for Mrs. Roberts. Kirk described her as a "combative patient who talked excessively, rattled her bed and hollered and screamed." On the day in question, Kirk heard the roommate pick up the phone and say, "Give me 666, Satan's residence." Kirk lifted the curtain separating the beds, and said "What?" The roommate received no response to her call, and threw a pitcher of water against the wall.

Kirk testified that she was a minister of the Living Word Christian Church, and ministered to residents of Respondent's facility. She affirmed that she believed in "spirits," on the authority of the bible. Kirk discussed religious subjects with the nurses on the nursing station, three of whom were "born-again believers." After the incident with Mrs. Roberts' roommate, according to Kirk, she went to the nurses' station and reported these events. The nurses started laughing. One of them asked whether Kirk thought that the spirit of Mrs. Roberts' deceased husband could be in the room. Kirk testified that she denied this —"once you're dead, you're gone," although a demonic force can take the form of a deceased loved one. Kirk denied that she felt this was the case in Mrs. Roberts' room.

Laura Cowser was at the nurses' station. She testified that Kirk first asked whether any of the nurses ever felt a presence in a room, but that nobody was there. Kirk came back to the nurses' station a few minutes later, and said that Mrs. Roberts' roommate had demons, had thrown a water pitcher against the wall, and had called "666, Satan's residence." Later, at the request of supervisor Janet Brown, Cowser signed an undated memo affirming substantially the same allegations as those made in her testimony. She identified the signature of Lynette Lacy on the same memo.[56]

Brenda Kirk denied that she ever said that Mrs. Roberts' room had demons. She merely discussed "spirits" with the nurses.

Suzanne Hughes testified that she instructed Mamie Parker to fire Kirk, and that the "main reason was the demons." Hughes testified that Laura Cowser reported to Hughes that Kirk had said Mrs. Roberts' roommate had demons in her room and had called the devil's telephone number, 666. Lynette Lacy, the unit clerk, was also present at the time.

Hughes testified that she had never heard Kirk talk about demons previously. She did not ask Kirk about Cowser's report. The following exchange took place during the General Counsel's examination of Hughes:

> Q. If Laura Cowser and Lynette Lacy said that Brenda Kirk was an axe murderer, would you have fired her without talking to Brenda first?
>
> A. If they saw her do it.

Hughes agreed that her mother's roommate was agitated and bothered Mrs. Roberts, and that she was moved to another room.

Hughes also testified that Janet Brown told her that Brown had seen Kirk in the hallway with a job applicant. "They were holding hands, praying and crying together." Nobody talked to Kirk about this incident. Hughes did not see Kirk "crying." She agreed that praying with and assisting a person in need was the proper thing to do.

Kirk filed a claim with the state unemployment compensation agency, and Respondent was asked the reason for her separation. Director of sitter services Mamie Paker signed a response saying that Kirk was taken off Mrs. Roberts' case because of "emotional instability."[57] However, Kirk credibly affirmed that Mamie Parker testified, at a hearing on her claim, that Kirk was an excellent worker and that Parker had no complaints about her. Parker said she was present at the hearing because it was her job and she had to be there.

Kirk has not been given any other cases since being taken off Mrs. Roberts' case.

3. Factual and legal conclusions

Brenda Kirk had been carefully selected by Suzanne Hughes to be the sitter for Hughes' mother. She gave the best care that

[55] GC Exh. 45.

[56] GC Exh. 46.

[57] GC Exh. 38.

any sitter had ever given Mrs. Roberts, in the opinion of CNA Supervisor Carol Purvis. However, at a company meeting on July 2, RN Cathy Ledbetter said that any employee stating she did not know what her position was, in fact intended to vote for the Union. Nonetheless, Kirk questioned Ledbetter and, at another meeting the same day attended by Hughes and other supervisors, stated that she wanted more information and intended to go to a union meeting. Six days later she was fired. Respondent's animus, its position that employees who reserved stating their opinion really supported the Union, and the haste with which Kirk was discharged make out a strong prima facie case.

The Board has long held that an employer's failure to conduct a fair investigation of alleged employee misconduct is evidence of discriminatory motivation. In this case no investigation whatever was conducted. The alleged "crying" incident took place about 3 weeks before the discharge, and Kirk was not even questioned about it. She was told to stop walking, and did so.

On the "demon" issue, Kirk merely reported to the nurses what had happened in Mrs. Roberts' room. Cowser was solicited by Supervisor Brown to sign a memo that Kirk said there were demons in the room, and later testified to the same effect. Kirk denied that she said this, and gave her version of the nurses' discussion of "spirits" described above. Cowser herself testified that she never heard any complaints about Kirk. Hughes made no effort to ascertain the truth—if Cowser and Lacy said Kirk was an "axe-murderer, Hughes would simply fire Kirk without asking her about it!" Mamie Parker, after telling the unemployment commission that Kirk was fired because of "emotional instability," testified at a hearing that she was an excellent worker, and that Parker had no complaints about her.

This contradictory evidence does not begin to rebut the General Counsel's prima facie case. I credit Kirk, and find that she was discharged on July 8 because of her union activities and sympathies, in violation of Section 8(a)(3) and (1).

H. The Deduction from Brenda Kirk's Paycheck

After Brenda Kirk's leg injury sustained at work, Respondent authorized her to receive medication from its pharmacy, without charge. Kirk received monthly prescriptions without paying for them, beginning in January 1996. After the meetings described above in which Kirk made statements about the Union, $43 was deducted from her next paycheck for this medication. Kirk complained to Suzanne Hughes and Mamie Parker. The latter told Kirk that she would see about it, and Kirk received payment for the deduction a few weeks later.

The only reason that the record shows for the deduction was Kirk's union activities, which led to her discharge on July 8. She had received the medication without charge for 6 months prior to this time. I conclude that the deduction was caused by her union activities, and violated Section 8(a)(3) and (1).

IV. THE ALLEGED REFUSAL TO BARGAIN

1. The appropriate unit

The complaint alleges as appropriate a unit of various employees including certified nursing assistants (CNAs) and excluding various other employees some of them being licensed practical nurses (LPNs).[58] Respondent's Answer admits that this is the unit found appropriate by the Regional Director's Order and Direction of Election, that it appealed this determination to the Board, and that the appeal was denied. Nonetheless, Respondent denies that the unit alleged in the complaint is appropriate.

Respondent presented no evidence in support of this contention. Rather, it submitted various arguments in its brief. It argues that 32 LPNs were improperly excluded from the unit, that they have the same supervision and share a community of interest with the CNAs, and interact with other employees included within the unit. Respondent acknowledges that the LPNs possess a license which the CNAs do not have, and have greater educational requirements. However, this merely establishes that the LPNs are technical employees, and does not require that they be excluded automatically from an overall unit of service and maintenance employees. Respondent cites *Park Manor Care Center*, 305 NLRB 872 (1991), in support of its argument.[59]

In the first place, Respondent's argument constitutes an impermissible attempt to relitigate an issue previously raised and decided in the underlying representation proceeding. Section 102.67(f) of the Board's Rules reads:

> The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. *Denial of a request for review shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.* [Emphasis supplied.]

The Board has relied on this section of the rules in rejecting a similar attempt to relitigate an issue raised in the prior representation proceeding. *Hafadai Beach Hotel*, 321 NLRB 116 (1996).

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[58] The allegedly appropriate unit is as follows:

INCLUDED: All full-time and regular part-time service and maintenance employees, including certified nursing assistants (CNAs), activity aides, dietary employees, cooks, maintenance employees, housekeeping employees, laundry employees, unit secretaries, care plan secretary, nursing service secretary, PBX operators, courier, pharmacy technician and medical supply technician employed at the Employer's 148 Tuscaloosa Street, Mobile, Alabama facility.

EXCLUDED: Activities director, assistant activities director, admissions director, assistant admissions director, housekeeping supervisor, assistant housekeeping supervisor, dietician, assistant dietician, registered nurses (RNs) department heads, PBX supervisor, licensed practical nurses (LPNs), accounting assistants, professional employees, guards and supervisors as defined in the Act.

[59] R. Br. 90–93. The citation given in the brief is "*Park Manor*, 134 NLRB 1101 (1991)." I infer that this is an inadvertent error, and that the correct citation is as given above.

Respondent's assertions in its brief alone show that its arguments have no merit. *Park Manor* held that a finding of technical status by LPNs does not automatically lead to exclusion from the broader unit, or to finding appropriate a separate technical unit. Rather, whether or not technical employees may constitute a separate appropriate unit depends on the relationship to other nonprofessional employees. In *Hillhaven Convalescent Center*, 318 NLRB 1017 (1995), the Board excluded LPNs from the unit despite the presence of some factors argued by Respondent herein to justify inclusion, to wit, common supervision with CNA's and similar working conditions. Factors which supported exclusion of the LPNs in *Hillhaven* were the LPNs' license and higher education requirements – factors also present in this case (318 NLRB at 1018, fn. 8). Similar factors led the Board to exclude LPNs from a unit similar to the one in this case in *Lincoln Park Nursing Home*, 318 NLRB 1160 (1995).

Accordingly, I find that the unit set forth in the complaint is an appropriate unit for collective bargaining.

2. The Union's majority status and the demand for bargaining

The parties agreed upon a list of 147 employees in the unit set forth in the complaint who were employed on April 18.[60] The General counsel introduced 82 authorization cards signed prior to that date by employees whose names appear on the stipulated list of employees.[61] The cards stated that the signer authorized the Union to represent the employee for the purpose of collective bargaining. Respondent presented no evidence to indicate that the cards were explained to the signer in a manner to disregard the clear language on the card. The signatures were verified by testimony of a union agent who received the card, by the testimony of other employees who witnessed the card signing, and by the signers themselves, *NLRB v. General Wood Preservative*, 905 F.2d 803 (4th Cir. 1990). I conclude that the Union represented a majority of the employees on April 18 in the appropriate unit designated above.

The pleadings establish that, on April 18, the Union demanded recognition and bargaining with Respondent with respect to the employees in the designated unit. The complaint alleges that Respondent refused to bargain. Respondent's answer denies this allegation. The pleading is frivolous, and I conclude that Respondent refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. Cogburn Health Care Center, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Medforce, a Division of MJP, Inc., is an agent of Cogburn Health Care Center within the meaning of Section 2(13) of the Act.

3. United Food and Commercial Workers Union, Local 1657, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

4. Respondent violated Section 8(a)(1) of the Act by:

(a) Interrogating its employees about their union membership, activities, and sympathies.

(b) Threatening its employees with closure of the facility if they selected the Union as their bargaining representative.

(c) Threatening its employees with discharge if they selected the Union as their bargaining representative.

(d) Telling its employees that it would not have to bargain with the Union if the employees selected it as their bargaining representative.

(e) Promising its employees a wage increase, insurance, and other benefits if they rejected the Union as their bargaining representative.

(f) Engaging in surveillance of its employees' union activities by use of video camera equipment and a private police force.

(g) Informing its employees that it would be futile for them to select the Union by requiring them to engage in mock collective-bargaining sessions in which the employer representatives were instructed to say "No" to all union demands;

(h) Promulgating a rule, which prohibited employees from wearing clothing reflecting union membership without first getting permission from Respondent.

(i) Offering its employees an increase in benefits if they would agree not to file unfair labor practice charges or objections to the election, and if they secured a waiver from the Board agreeing that it will not act upon any such charges or objections.

(j) Permitting procompany employees to leave their work stations and handbill on company property, while prohibiting prounion employees from handbilling on company property, thus promulgating an unlawful no-access rule.

[60] G.C. Exh. 55.

[61] I reserved ruling on the card of Elmira Theresa Hollins, pending comparison with a verified signature of hers on another document in evidence. I have examined the other document, and conclude that the signature on the card is that of Elmira Theresa Hollins. Accordingly, I receive GC Exh. 222. I make the same ruling for the same reason in the case of the card of Deloris Williams, GC Exh. 223.

The other employees who signed cards prior to April 18 are Beatrice Anderson, Chilean Banks, Elizabeth Black, Patricia Blackman, Dennia Boykin, Catherine Braggs, Angela Brasley, Acquinetta Brown, Vera Bryant, Barbara Cade, Linda Carmichael, Yvonne Coleman, Elaine Collins, Frankie Davis, Letty Davis, Roberta Donnell, Vanessa Fells, Helen Flynn, April Ford, Carrie Franks, Australia French, Betty Gamble, Emma George, Aucoin Geter, Alma Hayward, Patricia Hixon, H. Ellen Jackson, Mary Jettere, Ethel Johnson, Felicia Johnson, Ladriana Johnson, Delores Jones, Helen Jones, Matthew Jones, Zina Jones, Tiny Judson, Felice Kidd, Auretha Ladd, Carl Langham, Linda Leatherwood, Elizabeth Lockett, Marilyn McCarty, Shenece McCollum, Madelene Miller, Derrick Muhamad, Timothy Oaks, DeCynthia O'Neal, Sandra Ownens, Desdamonia Patton, Cable Perry, Mildred Peters, Patricia Pettaway, Mary Pettaway, Mary Prince, Marilyn Randolph, Yukalandis Roberson, Emaster Ruggs, Deidre Shepard, Gloria Stewart, Stella Strait, Thomas Strait, Sherry Taylor, Francine Thomas, Shanavie Thomas, Reginald Topin, Alfreda Tucker, Melva Turner, JoAnn Walker, Lahomer Washington, Carla Wiggins, Barbara Williams, Naomi Williams, Yvette Williams, Byron York, Lenora Young, Angela Brasley, Glenda Joyce Rogers, Ethel Husband, Tameron Key, and Elizabeth Brooks.

5. Respondent violated Section 8(a)(3) and (1) of the Act by engaging in the following conduct because of its employees' union activities and sympathies:

(a) Discharging Toni Hill on May 2 and causing its agent, Medforce, to cease employing her at Respondent Midtown's facility on August 13.

(b) Discharging Ethel Husband on May 16;

(c) Discharging Carla Wiggins on May 16;

(d) Discharging Carl Langham on May 17;

(e) Discharging Brenda Kirk on July 5, and deducting the amount of her medication from her paycheck.

6. Respondent violated Section 8(a)(1), (3), and (4) of the Act by discharging Elaine Collins on May 17 because of her union activities and sympathies, and because she gave testimony for the Union in a representation proceeding.

7. The following employees of Respondent constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> INCLUDED: All full-time and regular part-time service and maintenance employees, including certified nursing assistants (CNAs), activity aides, dietary employees, cooks, maintenance employees, housekeeping employees, laundry employees, unit secretaries, care plan secretary, nursing service secretary, PBX operators, courier, pharmacy technician and medical supply technician employed at the Employer's 148 Tuscaloosa Street, Mobile, Alabama facility.
>
> EXCLUDED: Activities director, assistant activities director, admissions director, assistant admissions director, housekeeping supervisor, assistant housekeeping supervisor, dietician, assistant dietician, registered nurses (RNs) department heads, PBX supervisor, licensed practical nurses (LPNs), accounting assistants, professional employees, guards and supervisors as defined in the Act.

8. On or prior to April 18, 1996, a majority of the employees in the unit described above designated and selected the Union as their representative for the purpose of collective bargaining with Respondent, and, on April 18, 1996, the Union demanded recognition and bargaining.

9. Since April 18, 1996, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit described above, and has thereby violated and is violating Section 8(a)(5) and (1) of the Act.

10. Respondent has not violated the Act except as set forth above.

VI. THE UNION'S OBJECTIONS TO THE ELECTION

Most of the Union's objections track the unfair labor practice charges and findings decided above. Specifically, I sustain Objections 1(d), 2(a), 3, 4, 5(b), 5(c), 6, 7(a), 7(c), 11, 13, 19, and 20.

Objection 16 alleges that Respondent issued a written warning to Marilyn Randolph on July 12 for soliciting a letter of recommendation from a family member of a resident on behalf of Elaine Collins, whom Respondent had discharged on May 17.

I have found above that Respondent violated Section 8(a)(1) by informing Marilyn Randolph that she could not wear a prounion T-shirt without first obtaining Respondent's permission. On July 12, Randolph was summoned to a meeting with Steve Roberts and Supervisor Janet Doughdrill, and was handed a reprimand for allegedly violating Company policy by asking the families of 2 residents to submit reference letters for Elaine Collins. Randolph asked to see evidence of the policies, but Respondent was unable to provide any. Doughdrill lectured Randolph with language similar to that used against the discriminatees—she was "not herself," and needed psychiatric help.

I sustain Objection 16.

THE REMEDY

It having been found that Respondent has committed unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action needed to effectuate the policies of the Act.

It having been found that Respondent unlawfully discharged Toni Hill on May 2, and August 13, Ethel Husband and Carla Wiggins on May 16, Carl Langham and Elaine Collins on May 17, and Brenda Kirk on July 8, I shall recommend that Respondent be ordered to offer each of them reinstatement to his or her former position, discharging replacement employees if necessary, without prejudice to his or her rights and privileges previous enjoyed. It is further recommended that each of them be made whole for any loss of earnings and other benefits he or she may have suffered by reason of Respondent's conduct to the date of Respondent's offer of reinstatement, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[62]

With respect to Respondent's refusal to bargain, the General Counsel and the Charging Party argue that a bargaining order rather than a rerun election is appropriate, under the authority of *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The General Counsel argues that Respondent has committed "hallmark" violations of the Act.

> Respondent's unfair labor practices encompassed a broad spectrum of activities, including threats of discharge, plant closure and loss of benefits, numerous coercive interrogations, promise of benefits, surveillance, futility, denial of access to the facility for union supporters, assignment of more onerous working conditions, interference with access to the National Labor Relations Board, the issuance of verbal and written warnings, and the actual and constructive discharge of conspicuous union supporters. Respondent's termination of six of the Unions' strongest supporters shortly before the representation ele c-

[62] Under *New Horizons*, interest is computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. §6621. Interest accrued before January 1, 1987 (the effective date of the amendment), shall be computed as in *Florida Steel Corp.*, 281 NLRB 651 (1977).

> tion—four within a two day period—had a chilling effect on the Union's organizing campaign.[63]

The Charging Party uses stronger language:

> Cogburn's response to the union campaign . . . was an intentional pattern of flagrant violations of the Act. . . . This pattern was carried out by all of the owners of Cogburn. . . . It was put into effect with constant input by anti-union advisor Cole . . . . This is, in other words, not a situation in which an election must be set aside because of isolated acts of rogue, overzealous supervisors. It is not even a situation in which an employer tried to skirt the law. It is a situation, instead, in which the employer literally and avowedly did not care about the law—it set about to violate known law, to let employees know that it was doing so, and to thumb its nose at the NLRB.[64]

> The Supreme Court in *Gissel*, supra, held that the Board's traditional remedies may be ineffective in some cases and a bargaining order may be required, particularly in cases marked by "outrageous" and "pervasive" unfair labor practices. The Board has termed these "hallmark" violations. *Highland Plastics*, 256 NLRB 146, 147 (1981).

I conclude that the violations which Respondent committed constituted such "hallmark" violations, and that they tended to intimidate employees. Respondent manifested extraordinarily intense hostility to the Union, and opposition to the Board's processes. Indeed, it stated to employees that it would not reinstate the unlawfully discharged employees unless a federal judge put a gun to its head. The Board and the courts have approved of bargaining orders in a host of cases where the employers committed violations no greater, or less than, those which Respondent committed in this case.[65] I conclude that there is little likelihood that Respondent's conduct will permit a fair rerun election, and that a bargaining order is therefore appropriate.

The Charging Party also argues that it should be reimbursed for litigation expenses. The Board has discussed the principles involved in this issue, as set out in *Heck's, Inc*., 191 NLRB 886 (1971), where reimbursement of litigation expenses was held justifiable only where the respondent's defense was "frivolous" rather than "debatable." Thus, the Board has recently stated:

> While we must exercise appropriate caution in finding factual or credibility based defenses to be frivolous, neither should we effectively hold that such defenses can never be so. Each allegation of a frivolously maintained defense must be evaluated in its particular context. We believe that this approach is fully consistent with the principles relied on in *Heck's*, because it does not discourage access to the Board's processes in any case where debatable issues, including genuine issues of credibility, exist. To the extent that *Heck's* may be interpreted as precluding the reimbursement of litigation expenses even when only pro forma credibility resolutions are made, we modify that policy to make clear that the Board may find a respondent's defense frivolous and order reimbursement of litigation expenses where . . . the defense relies on testimony that presents no legitimate issue of credibility. In such exceptional circumstances, reimbursement of these costs effectuates the policies of the Act by keeping the Board's docket available for meritorious cases and by compensating charging parties and the General Counsel for their needless expenditures caused by the respondent's adherence to a clearly meritless defense.

The Board considered the presence of issues other than the one on which the defense had no merit:

> We find that the presence of these additional allegations is insufficient to defeat the Charging Parties' and General Counsel's motions for reimbursement of litigation expenses. While we do not pass on the particular merits of any case previously decided by the Board, we disagree with the blanket notion that the assertion of a debatable defense concerning *any* complaint allegation, or even the dismissal of an allegation necessarily elevates the respondent's defense to the level that it may appropriately be characterized as debatable. Indeed, in any consolidated proceeding . . . there will be a variety of alleged violations, and some may be withdrawn or found lacking in merit. Limiting the award of litigation costs to only cases undiluted by other issues, however, would strongly encourage separate litigation of alleged unfair labor practices, which clearly would not be an efficient use of the Board's resources.

Finally, the Board also held that the egregiousness of a respondent's conduct constituted a further basis for requiring reimbursement of litigation expenses. *Frontier Hotel & Casino*, 318 NLRB 857, 861–862 (1995).

In this case, the principal issue concerning a remedy is the appropriateness of a bargaining order rather than a rerun election. This pertains to the refusal-to-bargain allegation. On this issue, Respondent impermissibly attempted to relitigate the appropriateness of the bargaining unit, and frivolously denied that it had refused to bargain. Although there were other issues, their presence does not raise Respondent's defense to a level that may be characterized as debatable, *Frontier Hotel*, supra. Further the egregiousness of Respondent's conduct constitutes an additional reason for granting the Charging Party's request for reimbursement of litigation expenses. Accordingly, I shall recommend that Respondent be ordered to reimburse the Charging Party for its litigation expenses, as determined in a supplemental proceeding.[66]

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[63] GC Br. 88.

[64] GC Br. 71.

[65] *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162 (D.C. Cir. 1993); *NLRB v. C.J.R. Transfer*, 936 F.2d 390 (6th Cir. 1991); *NLRB v. Q-1 Motor Express*, 25 F.3d 473 (7th Cir. 1994); *Skyline Distributors*, 319 NLRB 270 (1995); *Kentucky May Coal Co.*, 317 NLRB 60 (1995); *Frontier Hotel & Casino*, 318 NLRB 857 (1995); and *Sumo Airlines*, 317 NLRB 383 (1995). See also prior cases enumerated in undersigned's decision in *Central Broadcast Co.*, 280 NLRB 501, 538 fn. 60 (1986).

[66] The General Counsel did not request reimbursement for litigation expenses.

I shall further recommend a broad order, as Respondent's egregious and wide spread misconduct demonstrates a general disregard for employees' statutory rights. *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[67]

ORDER

The Respondent, Cogburn Health Care Center, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their union membership, activities, or sympathies.

(b) Threatening its employees with closure of its facility if the employees select the Union as their bargaining representative.

(c) Threatening its employees with discharge if they select the Union as their bargaining representative.

(d) Telling its employees that it would not have to bargain with the Union if the employees select it as their bargaining representative.

(e) Promising its employees a wage increase, insurance, or other benefits if they reject the Union as their bargaining representative.

(f) Engaging in surveillance of its employees' union activities by use of video cameras, private police forces, or otherwise.

(g) Informing its employees that it would be futile for them to select the Union, by requiring them to engage in mock collective bargaining sessions in which the employer representatives are instructed to say "No" to all union demands.

(h) Promulgating or enforcing a rule which prohibits employees from wearing clothing reflecting union membership without first getting permission from Respondent;

(i) Offering its employees an increase in benefits if they agree not to file unfair labor practice charges or objections to an election, and if they secure a waiver from the Board that it will not act on any such charges or objections.

(j) Permitting procompany employees to leave their work stations and handbill on company property, while prohibiting prounion employees from handbilling on company property.

(k) Discouraging membership in United Food and Commercial Workers Union, Local 1657, AFL–CIO, or any other labor organization, by discharging employees because of their Union activities or sympathies, or because they participate or testify in Board proceedings, or by discriminating against them in any other manner affecting their wages, hours, tenure of employment, or other conditions of employment.

(l) In any other manner, interfering with, restraining, or coercing its employees with respect to their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Toni Hill, Ethel Husband, Carla Wiggins, Carl Langham, Brenda Kirk, and Elaine Collins reinstatement to their former positions or, if any such position no longer exists, to a substantially equivalent position, dismissing if necessary any employee hired to fill any such position, and make them whole in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this order, remove from its records all references to its unlawful discharges of Toni Hill, Ethel Husband, Carla Wiggins, Carl Langham, Brenda Kirk, and Elaine Collins, and inform each of them in writing that this has been done, and that the aforesaid actions will not be used as the basis of any future discipline of them.

(c) Within 14 days from the date of this Order, rescind its rule prohibiting employees from wearing clothing manifesting membership in the above-named labor organization without receiving permission from Respondent.

(d) Reimburse the Charging Party for its litigation expenses, as determined in a supplemental proceeding.

(e) On request, recognize and bargain with United Food and Commercial Workers Union, Local 1657, AFL–CIO, as the collective-bargaining representative of the employees in the following appropriate unit, and, if agreement is reached, reduce it to a formal written document:

> INCLUDED: All full-time and regular part-time service and maintenance employees, including certified nursing assistants (CNAs), activity aides, dietary employees, cooks, maintenance employees, housekeeping employees, laundry employees, unit secretaries, care plan secretary, nursing service secretary, PBX operators, courier, pharmacy technician and medical supply technician employed at the Employer's 148 Tuscaloosa Street, Mobile, Alabama facility.
>
> EXCLUDED: Activities director, assistant activities director, admissions director, assistant admissions director, housekeeping supervisor, assistant housekeeping supervisor, dietician, assistant dietician, registered nurses (RNs) department heads, PBX supervisor, licensed practical nurses (LPNs), accounting assistants, professional employees, guards and supervisors as defined in the Act.

(f) Preserve and, within 14 days of a request, make available to the Board or the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Tuscaloosa Street and Midtown facilities, Mobile, Alabama copies of the attached notice marked "Appendix."[68] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized

[67] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[68] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 18, 1996.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election in Case 15-RC-7988 is set aside.

Dated at Washington, D.C. June 4, 1998

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees about their union membership, activities, or sympathies.

WE WILL NOT threaten our employees with closure of our facility if they select the Union as their bargaining representative.

WE WILL NOT promise employees a wage increase, insurance, or other benefits if they reject the Union as their bargaining representative.

WE WILL NOT engage in surveillance of our employees' union activities by use of video cameras, private police forces, or otherwise.

WE WILL NOT inform our employees that it would be futile for them to select the Union, by requiring them to engage in mock collective bargaining sessions in which the employer representatives are instructed to say "No" to all union demands.

WE WILL NOT promulgate or enforce a rule which prohibits employees from wearing clothing reflecting union membership without first obtaining our permission.

WE WILL NOT offer our employees an increase in benefits if they agree not to file unfair labor practice charges or objections to an election, and if they secure a waiver from the National Labor Relations Board that it will not act on any such charges or objections.

WE WILL NOT permit procompany employees to leave their work stations and handbill on company property, while prohibiting prounion employees from handbilling on company property.

WE WILL NOT discourage membership in United Food and Commercial Workers Union, Local 1657, AFL–CIO, or any other labor organization by discharging employees because of their union activities, or because they participate or testify in Board proceedings, or by discriminating against them in any other manner.

WE WILL NOT in any other manner interfere, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act.

WE WILL offer Toni Hill, Ethel Husband, Carla Wiggins, Carl Langham, Brenda Kirk, and Elaine Collins reinstatement to their former positions, and make them whole, with interest, for any loss of earnings they may have suffered because of our unlawful discharges of them.

WE WILL remove from our records all references to the above-cited unlawful discharges, and inform each employee that this has been done, and that the discharges will not be used as the basis of any future discipline of them.

WE WILL rescind our rule prohibiting employees from wearing clothing manifesting membership in the Union without receiving our permission.

WE WILL, on request, recognize and bargain with the above-named Union as the representative our employees in the unit found to be appropriate, and reduce any agreement reached to writing.

WE WILL reimburse the Union for its litigation expenses incurred as a result of this proceeding.

COGBURN HEALTH CARE CENTER, INC.